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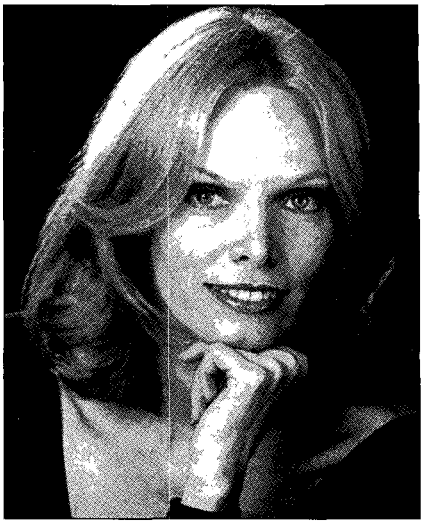

by Leil Lowndes

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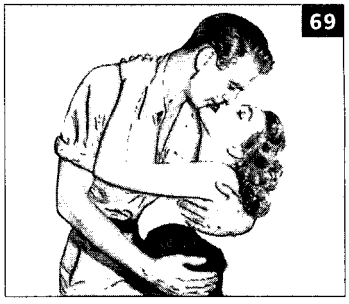

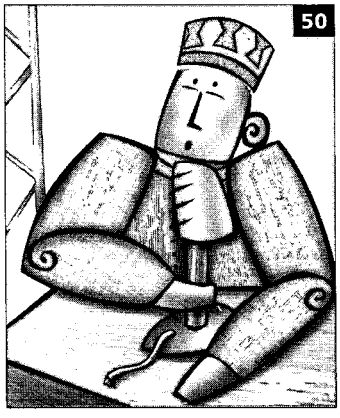

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Creative Matrix

What we lose by regulating culture

By Virginia Postrel

"Whereas the distracted state of England, threatened with a cloud of blood by a civil war, calls for all possible means to appease and avert the wrath of God, it is therefore thought fit and ordained by the Lords and Commons in this parliament assembled that, while these set causes and set times of humiliation continue, public stage plays shall cease and be forborne."
—Parliamentary edict, September 2, 1642

In the United States, Congress does not close the playhouses. It just holds periodic hearings to bully the people who produce popular entertainment. They bow and scrape and halfheartedly apologize for their audience-pleasing products, usually by vague reference to unnamed works that go too far. Then everyone goes back to their business until the next time a committee chair decides the nation's distracted state warrants an attack on its favorite arts.

All of which happened, pretty much according to script, in response to the murders in Colorado. The Senate Commerce Committee convened its show trial in early May. The agenda was to make popular art into the equivalent of cigarettes: a demon drug sold by greedy liars to corrupt our youth. "Joe Camel has, sadly, not gone away," said Sen. Joseph Lieberman (R-Conn.), the committee's most eager attacker. "He's gone into the entertainment business."

Bill Bennett, described as "the conscience of America" by committee Chairman John McCain (R-Ariz.), came prepared to name works deserving censure, and possibly censorship. He showed clips from *Scream* and *The Basketball Diaries*. "Can you not distinguish between *Casino* and *Macbeth*, or *Casino* and *Braveheart*, or *The Basketball Diaries* and *Clear and Present Danger*?" Bennett said. "I can make that distinction."

Despite some chilling moments, the hearings flopped. Executives from the movie studios and record companies declined to come and cooperate in their own denunciation. Deprived of dramatic confrontations or lying CEOs, reporters and the nation yawned. A month later, the House soundly defeated two bills to regulate entertainment products—one through outright bans, another through cigarette-style labeling. A significant, bipartisan majority disagreed with Bennett that "in the matter of the protection of our children, nothing is off limits."

Not so the Clinton administration. It acted unilaterally to appease the soccer-mom gods. Adopting the tobacco model, the president ordered the Federal Trade Commission to investigate "whether and how video game, motion picture and recording industries market to children violent and other material rated for adults." The commission will exercise de facto subpoena power, demanding proprietary memos, private e-mail, and internal marketing studies. The attack on Hollywood is now part of the Clintonite campaign to restore the FTC's pre-Reagan punch; the issue is not free speech but free markets. The president is embracing Bennett's belief that "this is predatory capitalism."

If you want to eliminate a product from the American marketplace, this is the way you do it—not by act of Congress, but through administrative agencies helped along by liability suits. Clinton has unleashed the regulators, and, as Jesse Walker discusses below, the lawsuits have begun.

But what does it matter? Suppose all violent movies vanish from the theaters, made uneconomic by regulatory burdens, unpredictable lawsuits, and congressional harassment. Who cares?

The audience, for starters. Tens of millions of people saw *The Matrix*, a blockbuster hit and one of the recent movies most often attacked as a blight on our culture. Most of those moviegoers, including me, think *The Matrix* is a fine film whose existence is a positive good. It is visually striking, well acted, and intelligently written. It explores classic themes, arguing that it is better to face reality and struggle for freedom than to accept comfortable slavery and live in illusion. It is not Great Art, but it is good art, and good entertainment. We, its paying audience, would not want to see it destroyed.

This raises the problem that so annoys Bennett: the subjectivity of distinctions. Any objective standard that would censor *The Matrix* (or *Casino*) as too violent would have to curb *Macbeth* and *Braveheart* as well. Shakespeare's Scottish play is horrifyingly violent—Akira Kurosawa's retelling is aptly called *Throne of Blood*—and so is Mel Gibson's Scottish movie. *Braveheart* depicts torture and celebrates warfare. You cannot ban *Scream*, *The Matrix*, and *Casino* and make an exception for Bill Bennett's bloody favorites. The distinctions required are too fine, and a different critic would cut things differently.

I do sympathize with Bennett on one point: It is tiresome and clichéd to keep invoking Shakespeare, whom no one would dare ban today. But there's a reason the Bard keeps coming up, and it isn't that everyone in *Hamlet* ends up dead.

That reason is seared in the consciousness of every English-language player, right down to the members of the Screen Actors Guild: You *can* ban Shakespeare. It happened. In 1642, the greatest period of English theater was ended by an act of Parliament. The milieu that had produced Shakespeare, and that continued to perform his plays, was destroyed. Those theaters were full of sex, violence, and special effects—and of poetry, ideas, and creative promise. English drama never fully recovered from the loss. Had the closure come a mere 50 years earlier, we would have lost *Romeo and Juliet* and everything that followed.

Loss and near loss haunt last year's *Shakespeare in Love*, Hollywood's fondest vision of itself and its art. A Puritan preacher appears early on, denouncing the theaters as "the devil's handmaidens," and the authorities are always closing the play-

houses. *Romeo and Juliet* barely finds a stage. "I would exchange all my plays to come for his that will never come," says Will Shakespeare when Kit Marlowe is killed. We modern moviegoers are presumed to know better. But it is not that easy a call. Marlowe's small oeuvre is extraordinary, all written before he was 30. Who knows what might have been his *Hamlet*?

Loss is at the heart of the argument against regulating creativity, whether in art, technology, or enterprise. The innovative process is a fragile one, dependent on a complex, often messy interplay of imagination, competition, and exchange. Curbing new ideas hurts not only individual creators but the audience for which they create and the posterity that inherits their legacy. Regulators destroy some goods directly, and we can count the cost. Other losses, like Marlowe's never-written plays, we can only imagine.

This not simply a matter of great work but of the milieu from which it springs. To get the good stuff, you have to put up with the experiments that fail and the junk produced to pay the bills. Alongside the hack work of Greene and Dekker, even Shakespeare wrote some dogs. But crush *Titus Andronicus*, and you will lose *King Lear*. The same process produced them both.

How does it matter that in the 15th century China turned its back on exploration and innovation, that the world's most technologically creative nation became a backwater by decree? We cannot know for sure. But the loss, to the Chinese people and to the world, was surely significant.

When congressional pressure and anticompetitive opportunism created the Comics Code, declaring American comic books an inherently childish medium, EC Comics' horror tradition was destroyed and its readers bereft. That was the short-term effect. The larger loss was in the stories untold, the techniques unexplored. We can infer something of its magnitude by looking at the development of graphic storytelling in Europe and Japan. But we can never know what might have been.

In *The Future and Its Enemies*, I argue that individual creativity and enterprise are not only personally satisfying but socially good, producing progress and happiness. For celebrating creativity and happiness, I have been called a fascist by critics on both coasts. It is a peculiar charge, since fascism entails subordinating the individual to the nation—hardly a recipe for either self-expression or joy. But the charge expresses a coherent worldview, one that imagines freedom as the will to power and the good life as docile obedience.

This view quite naturally leads to crusades against popular art, particularly American art, since our native culture is anti-authority. Writing in *The American Spectator*, movie critic James Bowman denounces *The Matrix*, whose science fiction setting he clearly does not understand, for teaching "kids contempt for the values of work and sobriety and conformity to social norms." This critique condemns not just the movie but the inventiveness that made it possible. It is a prescription for the death of creativity and an attack on the American spirit. By this standard, *Hamlet* is safe. But what about *Huck Finn*?

Bringing Art to Court

The new censors

By Jesse Walker

Rose Dyson wouldn't quite cop to being a censor. She had bragged about how her group, Canadians Concerned About Violence in Entertainment, had helped keep Howard Stern off the air in part of her country; she had endorsed the V-chip, though she felt it would be "only 10 percent of the solution"; she wanted to sue filmmakers whose movies may have prompted copycat crimes. She even admitted to supporting the old "Suicide Solution" case from the '80s, in which a father took Ozzy Osbourne to court over the song he was convinced had driven his son to kill himself.

But the word *censor* has negative connotations, and whenever I told Dyson that she sounded like one to me, she'd say, "I think we need to redefine *censorship*." She never offered an alternative definition.

We were sitting in a bar in Athens, Ohio, where we were both attending a conference of media critics. I was there because I wanted the media to be more open. She was there because she wanted them to be more peaceful.

Video violence, she told me, was a "cheap industrial pollutant," and she didn't mean that metaphorically. The companies that "manufacture" violent movies, she explained, should be as responsible for their products' effects as a factory that spits real poisons into the air or water. Nor did it matter what the filmmakers' intentions were: While she didn't buy the argument that *Natural Born Killers* was an invective against media violence (implying that she either hadn't seen the movie or wasn't very bright), it wouldn't matter to her if it was. "Artistic merit," she said, "should not be a defense."

That was the one point where we agreed, since I figure the First Amendment protects bad art as well as good.

I had brought up *Natural Born Killers* because it is the target of an increasingly notorious lawsuit. Four years ago in Louisiana, 19-year-old Sarah Edmondson shot and paralyzed a convenience store clerk, Patsy Byers, as part of a multi-state crime spree. Byers' husband responded by suing Time Warner for releasing the film and Oliver Stone for directing it, arguing that the movie had incited the crime. (Edmondson and her boyfriend say they watched it more than 20 times before they started their spree.) Despite the case's obvious First Amendment problems, the trial judge agreed to hear it, citing a similar suit against Paladin Press as a precedent (see "The Day They Came to Sue the Book," page 59). Now the Stone case itself is a precedent: With it moving forward, no one has stopped a similar suit blaming the film *The Basketball Diaries*—along with several other cultural artifacts, including some violent video games and two nudie Web sites—for the shooting deaths of three girls in Kentucky.

The lawsuits have been endorsed by the usual alliance of social conservatives and liberal social engineers, the same combination that's made war on cinematic

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speech since the New Dealers and the National Legion of Decency united behind the Hays Office and its infamous Production Code. But this is uncharted territory. As bad as the old censorship was, it did not require artists and entertainers to measure in advance every possible effect their work could have on every possible person in their audience.

Slowly, a debate about art has degenerated into a debate about externalities. And that's very dangerous indeed. After all, culture consists of nothing *but* spillover effects.

The threshold for censorship used to be "redeeming social merit": Any positive effect was, in theory, enough to let a book be. The Dyson standard turns this on its head: It says any negative effect is sufficient to snuff something out.

In other words, it outlaws art itself. From *Hamlet* to *Huck Finn* to *Happiness*, most great works of art (and a lot of lesser efforts) are ambiguous, or at least open-ended; they invite debate, demanding different responses from the audience. Any really interesting movie about violence is going to leave some issues open, if only because so many of the questions it will pose will not lend themselves to pat answers. Some find this insightful; for the Dyson crowd, it's inciteful.

Is *True Lies* a mindless action movie, a parody of mindless action movies, or a corrosive satire of the American family? Is *Fargo* a satire of bourgeois virtues or a defense of them? In the *Godfather* trilogy, is the Mafia admirable or repulsive? In each case the answer is "all of the above," by the filmmakers' deliberate design.

And even if only one answer is correct—even if the director has a pat point to make—what then? *Natural Born Killers* is obviously opposed to violence, yet it nonetheless may have inspired some violent behavior. Nasty Nazi movies like *The Eternal Jew* were made to foment anti-Semitism, but they're sometimes shown today to fan fears of bigotry.

You never know to what uses your work will one day be put: When the good folks at CBS created *The Bob Newhart Show*, they never dreamed they were also inventing a drinking game. (How many people have been killed by drivers inebriated by a round of "Hi, Bob"? Should their families be allowed to sue Newhart?)

Some audiences impose weird new meanings onto books and movies, drawing them into elaborate personal mythologies. In *Crumb*, Terry Zwigoff's documentary about the cartoonist R. Crumb and his family, one of the artist's brothers discusses the weird, vaguely sexual fantasies he projected onto Byron Haskin's film of *Treasure Island* as a boy, filling notebooks with his take on the story and bullying his siblings into re-enacting key scenes.

No one at Disney could have imagined that their movie would have inspired such a reaction, any more than the makers of *Star Trek* could have foreseen that their series would inspire a new genre of fan pornography, centered on the potential liaisons between Spock and Kirk. Two years ago, a crank book called *The Bible Code* became a best-seller because it allowed readers a new way to engage in the ancient art of finding whatever meanings they pleased in the Bible. God, presumably, is turning in his Nietzschean grave.

There are plenty of good reasons to be against the *Natural Born Killers* and *Basketball Diaries* lawsuits, from their chilling effect on free speech to their willingness to let criminals disavow responsibility for their acts. But the suits are wrong on their own terms, too. Sure, art can be an influence for ill, just as it can do good. Courts do not award extra dollars to entertainers for the unforeseen positive byproducts of their work. Why penalize them for the less fortunate consequences of what they do? ◆

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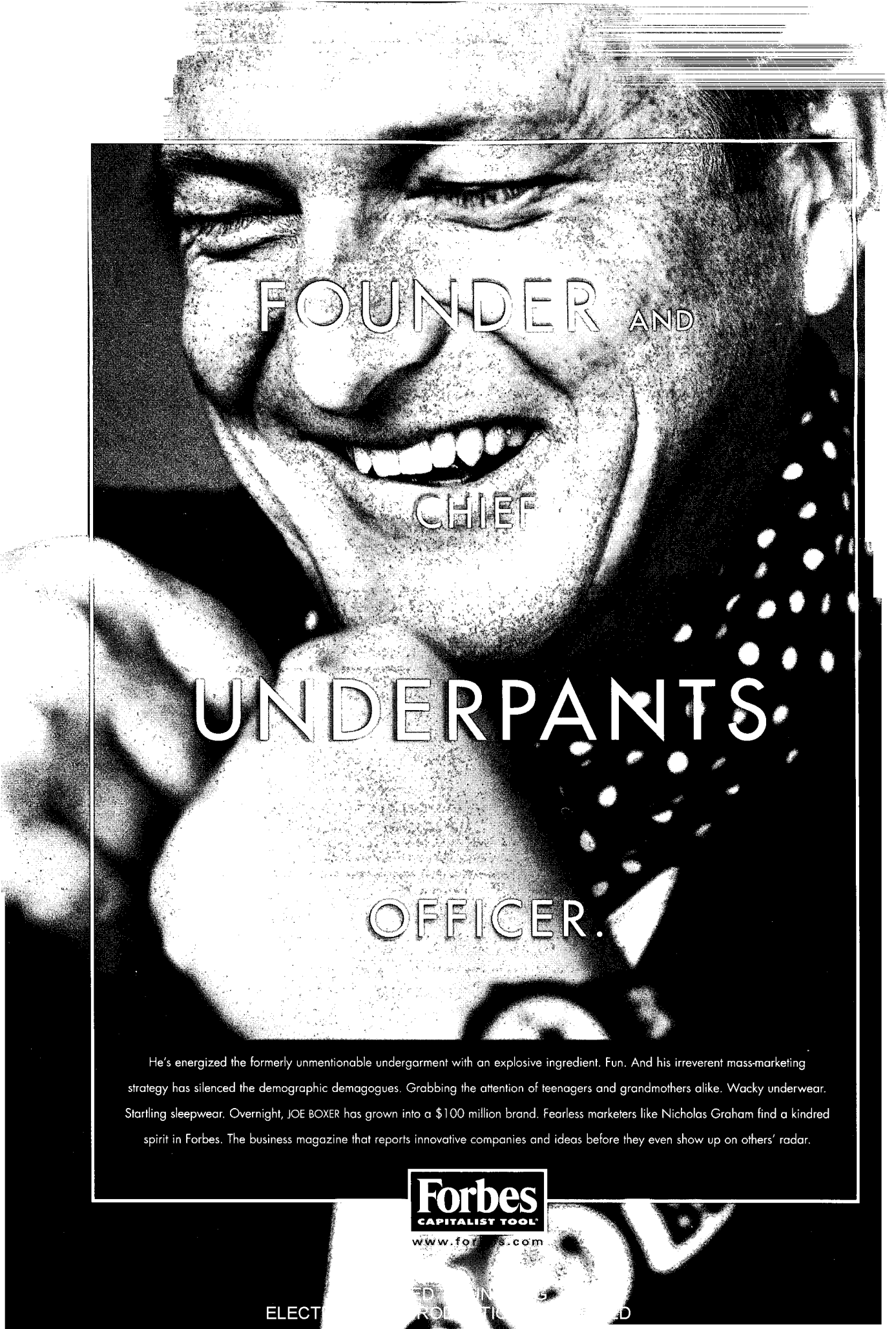

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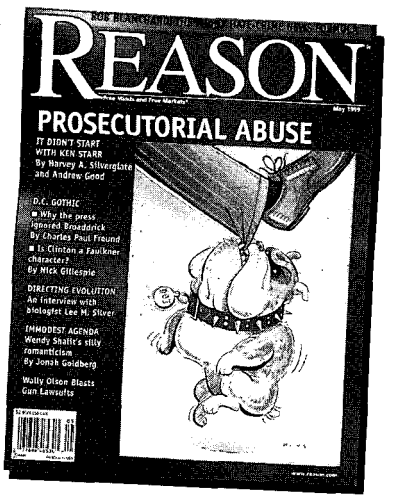

A Better Memorial

I wish to thank Robert O. Blanchard for articulating the issues of Matthew Shepard's death and pending hate crime laws with such clarity, such reason, and such compassion ("The 'Hate State' Myth," May). The article serves as a powerful reminder of both the terrible nature of the crime and the poor memorial that hate crime legislation pays to Mathew Shepard and others who fall prey to violent crime.

If I had any criticism to levy upon the article itself, it is that the author did not write more about alternatives to hate crime laws or of the existence of organizations such as Gays and Lesbians for Individual Liberty, Log Cabin Republicans, Libertarians for Gay and Lesbians Concerns, the Independent Gay Forum, and Highly Productive Publishing Page. These groups address gay rights in a forum respectful of the free market and individual liberty.

If Matthew Shepard is to be remembered as something more than a two-dimensional poster boy for hate crime legislation and religious "God Hates Faggots" groups it will be because his name is invoked to celebrate individuality and secure liberty. So let us never forget Matthew Shepard and let us implore peaceful means to fight homophobia. Let us push for pro-liberty changes, from abolishing sodomy laws to ending the military ban to the many other areas where the government has stuck its nose where it never should have.

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Hometown Hosannas

As one who grew up in Brasilia, I take issue with "In a State's Eye" (May), Jesse Walker's review of *Seeing Like a State.* The article calls the city "a new capital in inland Brazil, constructed without regard for the country's present or past; a crowdless, cultureless monument not to the nation that built it but to an abstract idea of what a great city should be."

First of all, the main reason for constructing a new capital in the "planalto central"—a dry flatland in the heart of Brazil—was to spread development toward Brazil's central region, which at that time was extremely underdeveloped compared to the coastal regions. So the plan of building Brasilia not only *did* take into account the geographical reality of the country but was in part a consequence of it.

At the time it was built, most Brazilians thought it was a crazy idea that would never work. For this reason the government had to propose incentives, such as free housing, to attract people to settle in the middle of nowhere for a new life. Nowadays, Brasilia itself is enough of an incentive to new settlers that the government no longer needs to provide them.

With regard to its original goal, Brasilia *did* work just as intended: The entire Federal District *has* become an industrial center, where, incidentally, polluting industries are forbidden. It has also spawned other centers beyond its outskirts. Yes, Brasilia does have settlements around it, but don't all big cities? The fact that these settlements proliferate at such a high rate is in part the result of people leaving their home place to try their luck in Brasilia.

I grew up in one of the city's "huge concrete apartment buildings and gigantic, lifeless squares." The *small* streets that enter each square or "quadra" dead-end there. That means there is no traffic on these small streets. That, and the huge open spaces between the buildings within a quadra, make it a paradise for kids. As a kid I had a football-field-sized lawn right in front of my building to play in, and I could go to local stores of the quadra without having to cross any traffic.

Finally, those who come for a quick visit might agree with Walker that Brasilia has no landmarks, but I believe the landmarks are just more subtle. Of course much of what are called "cultural landmarks" belong to a city's history—which, being only 39 years old, the city currently lacks. What it does have that others might lack is a mixture of cultural backgrounds of people from all over Brazil; it is a city of contrasts. We say there that there is no in between; either you hate it or you love it. Walker hates it; I love it.

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Jesse Walker replies: One theme of James Scott's book is the difference between knowledge rooted in local experience and knowledge rooted in abstract theories. In that spirit, I will not presume to dispute a Brasilian's account of her own city, and certainly not her right to love it. I'm afraid, though, that Damiao's civic pride may have clouded her reading of my review.

Scott had many criticisms of Brasilia,

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but the settlements around it were not among them. His point—and mine, in reviewing his book—was that Brasilia could never have survived *without* such settlements; that for all the planning that went into building Brasilia, it was the unplanned, spontaneous side of the metropolis, from the squatters' settlements to Damiao's "subtle landmarks," that sustained the city.

As to whether Brasilia was built without regard for Brazil's present and past: Surely a bureaucratic government's efforts to draw "development" to a part of the country that no one had heretofore felt the need to develop fits the bill. The fact that the government now props up industries in the same region doesn't change that diagnosis one bit.

In Military's Defense

I found several faults or misinterpretations in Glenn Harlan Reynolds' article ("It Takes a Militia," May). Militias in the United States have had, at best, a mixed history. The review glorifies them for being of the people but doesn't touch on their faults. Reynolds claims that militias can be a check on foreign wars. (The Mexican War of 1848 was largely fought with militia units.) However, militias have tended to be inordinately wasteful (chiefly in lives), due to a lack of training and discipline, both tactically and administratively. The Civil War illustrates this clearly. By the middle of the war the volunteer units had become almost carbon copies of the regulars except with slightly looser discipline.

As for the threat of a coup, it's no lie to say that the military community has drawn away from the civilian world to some extent. However, most military personnel still take the oath seriously. There's a big divide between the senior leadership and the rank and file. The average GI still believes in this country; too many have been overseas and seen just how good we still have it. We're far more loyal then most of the civilian leadership. Expensive, yes, but much of that cost comes from Congress and the senior leadership looking for miracle gear.

I'm a regular Army infantry noncommissioned officer with 19 years of service. I agree that those who do not wish to defend their freedom may not be deserving of it, but after 19 years, I still have to believe they are.

Charles A. Temm Jr
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Glenn Harlan Reynolds replies: Charles Temm's remarks about the militia echo those from other professional military men. They are not so much wrong as beside the point. Before one assesses how good a military force is, one must consider its mission. During the 18th and 19th centuries, militia forces proved quite effective at their primary purpose: defense of local terrain against invasion and insurrection. (Militia-like forces are still good at this, even against professional soldiers, as the U.S. experience in Lebanon and Somalia illustrates.)

When it comes to projecting power abroad, militias aren't as good. Part-time soldiers are less willing to go on such missions, and, as Temm rightly notes, preparation for such work requires more and different training than does the defense of familiar terrain. To the Framers, who feared not only standing armies but also the imperial ambitions they would bring, this unsuitability for foreign missions was not a flaw but a feature: A militia-based defense strategy was far less likely to produce foreign entanglements and wars. As Gary Hart correctly points out in the book I reviewed, our current situation—with so many foreign troop deployments that even military buffs can't keep track of them all and with wars initiated essentially on presidential whim—would have horrified the Framers. A professional army is better suited to our current situation, but the militia system was meant to keep us out of the situation altogether.

Likewise, I find Temm's profession of military loyalty reassuring. But the Framers, knowing that human institutions are fallible, sought to create a framework in which our liberties were not dependent on the loyalty of a standing army.

Courting Distortion

I found Jonah Goldberg's review of Wendy Shalit's *A Return to Modesty* ("Conserva-

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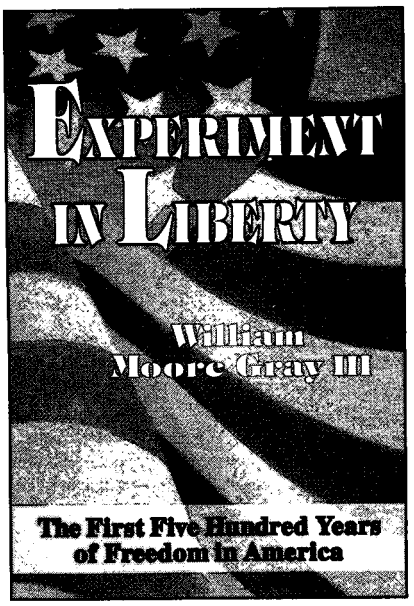

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tism Without History," May) a stream-of-consciousness ramble of reactions which did not have much relevance to the text ostensibly under consideration. Perhaps he ought to have waited until the audiotape version became available.

First, I cannot share Goldberg's perception that Shalit "ignores the essential insight of modern conservatism" about the need for gradualism in reform. His assertion that she is indifferent to history completely inverts what strikes me as her goal, a recovery of memory. It's not that she believes restoring the use of calling cards would instantly solve the problems of modern courtship; Shalit's service is in reconstituting a vision and ritual of courtship which commonly is distorted or derided today.

Second, Goldberg adduces an "inconsistency" in Shalit extolling paternalism while, at the same time, condemning a House of Lords case acquitting men of rape on "implied consent" grounds. But such a reading confuses Shalit's support for the duties and privileges embedded in familial relationships with her opposition to the modern liberal regime, which has subjected even social relations to contractarian ideology.

Finally, his review completely avoids mentioning Shalit's criticism of those conservatives who have readily acquiesced to the destruction of romance because it releases them from the obligations of chivalry and marriage that once afforded women a measure of protection. Neoliberal economics and sexual libertinism are viable only when human persons first have been reduced to individual economic agents. Although Goldberg remains curiously silent about the subject, here is where he might direct his concerns about ahistoricism and abstract political theorizing.

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Jonah Goldberg argues that the main problem with Wendy Shalit's prescription for a return to modesty is that it ignores the changed historical context. Modesty flourished in a historical context far different from the modern context, in which modesty, he seems to think, cannot exist. We can't go back to calling cards because we have the telephone now. And birth control and other technological inventions change the whole context in which we live our lives and make our sexual decisions.

But does the changed historical context really mean that we can't go back to modesty? The historical context obviously influences human behavior but does not determine it (perhaps Goldberg underestimates the role of ideas in what human beings do). I see no reason why we can't implement Shalit's prescription in a way that is sensitive to the historical context.

Greg Feirman
San Diego, CA

Jonah Goldberg replies: I have no gripe with Greg Feirman's comments. If I was unclear, let me say it now: I'm pro-modesty. Again, if Shalit were arguing for "neo" Victorianism she might have won me over.

Which brings us to Morgan Knull, who says my critique runs counter to Shalit's goal. So what? If she'd written a cookbook on cake baking and I said her recipes didn't work, would I be against cake? I can applaud her goals, and some of her insights, without rubber-stamping her arguments.

Don't blame me for confusion; go to the source. Simultaneously embracing notions of modesty—or sexuality—from several different centuries causes confusion. Ms. Shalit rejects today's "contractarian" regime. Hey, me too. But does she want to replace it with a system from the 19th century or the 15th? I've read the book and have no idea; yeah, maybe I will when the audiotape comes out.

Lastly, let me dispel the mystery of my curious silence about fellow conservatives who've abetted the destruction of romance. They seem like straw men to me. But if these conservative cads exist, they should be thrashed about the head and neck with a wet fish.

Hot Coffee, Bad Example?

In his article bemoaning the effects of local actions far beyond a given state's borders ("Firing Squad," May), Contributing Editor Walter Olson uses the famous McDonald's coffee case as an example. He complains that now he cannot get a cup of too hot coffee on a frigid morning in New England, apparently overlooking the fact that in a free society he is welcome to pour it, boiling hot, into a thermos from which he can for hours scald his mouth. Olson's spin on the McDonald's coffee case is inappropriate because:

1) The plaintiff suffered third-degree burns despite receiving assistance from her companion immediately after spilling.

2) McDonald's had earlier received numerous complaints that its coffee was served too hot. The company decided not to act due to the high cost.

3) The jury settled on the amount to award the plaintiff, punishing McDonald's for its penurious attitude toward the safety of its customers, by requiring that it pay damages equal to just one day's income from the sale of its coffee nationwide.

I am not aware of anything in the court case that requires McDonald's to reduce the temperature of its coffee nationwide. The company apparently decided that it is now cost-effective to do so. Good thinking. I can't say the same for Olson.

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Walter Olson replies: J. Citti does not dispute the point for which I cited the hot coffee case: If one New Mexico jury can compel McDonald's to alter its nationwide course of conduct even though many juries elsewhere would have decided the same case in favor of the company, then the coffee temperature "policy" we get will represent neither local option nor a national regime geared to the preferences of the median jury, but instead a national regime geared to the preferences of whichever local juries the plaintiff's lawyers can

CORRECTIONS

■ A word omission on page 66 of "Welfare Cases" (May) gave the mistaken impression that Franklin Roosevelt was governor of New York in 1919. The paragraph should have read "a bill allowing it was vetoed in 1931 by then-Gov. Franklin Roosevelt."

■ Marshall Onellion, professor of experimental physics at the University of Wisconsin, was misidentified on page 38 of the July 1999 issue.

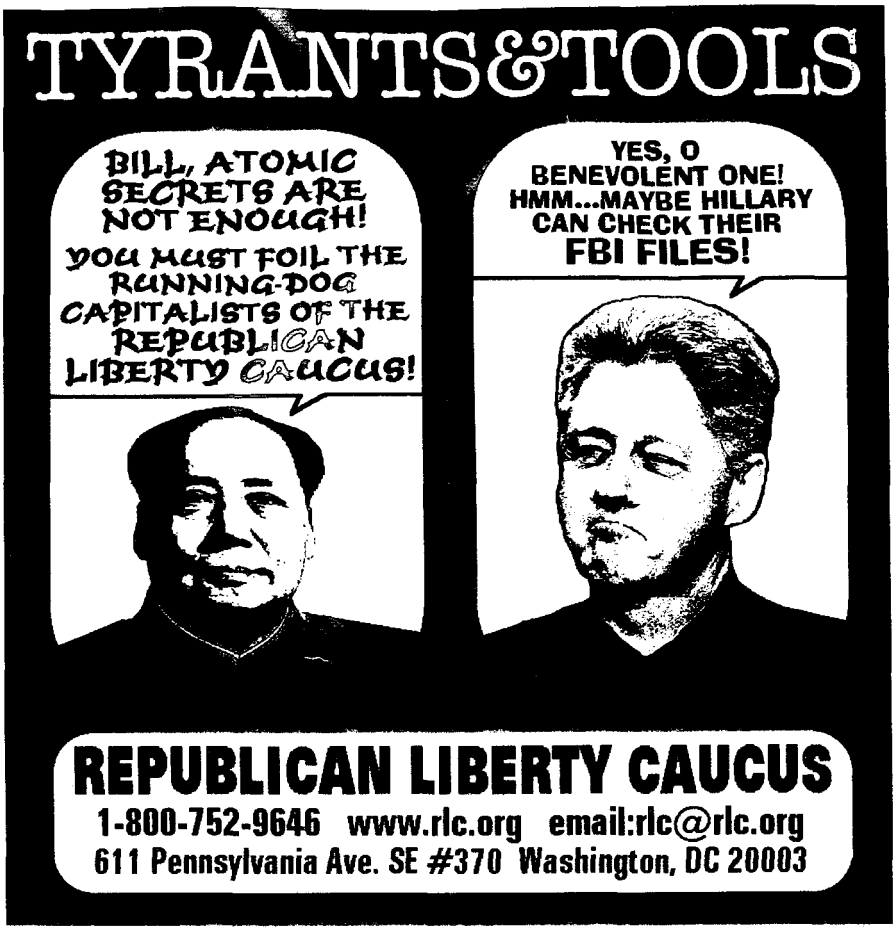
find that are most favorable to their cause. (As I pointed out, litigation against gun makers is going to follow the same model, which may allow unrepresentative local juries to impose, in effect, nationwide gun control.)

Stung by the public's predominantly negative reactions to the McDonald's case, lawyers have expended vast amounts of energy trying to turn those reactions around, claiming that the public has been fooled and would certainly take their side if it knew the true facts of the case. Their problem in trying to swing this, it seems to me, is that since day one virtually all the cards have been face up on the table.

Everyone knows that water boils at the same temperature at a restaurant as when you put the teakettle on the stove for your own family. Everyone old enough to have drunk much take-out coffee knows why big chains prefer to hold it at a higher temperature, which has relatively little to do with saving money (lower holding temperatures would in fact save electricity) and a great deal to do with the preferences of take-out buyers themselves. And everyone with even a slight exposure to statistics finds it unsurprising that when a hot liquid is sold so many times a year there will be, despite reasonable precautions, people who spill it, and that some of the resulting injuries will find their way into the hands of lawyers.

Few were shocked, then, to learn that McDonald's had faced a steady trickle of such claims for many years, which (until it got unlucky in the New Mexico case) it had fought with much success by invoking the time-honored common law defense of assumption of risk. It is one of the tort system's more appalling vices that this very record of having zealously and successfully defended the blamelessness of its conduct should be turned into a reason for extra punishment. The message comes across loud and clear: Don't try to resist.

As for the efforts at sarcasm about my right to go on filling a thermos at home, I suspect they're likely to backfire among REASON's liberty-loving readers. Yes, I'm still allowed to boil water at home; but I can't pay other people to re-create the same beverage while on the road unless I simultaneously buy from them an insurance contract covering some of the injuries that might result from the purchase.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Choice Moves

By Michael W. Lynch

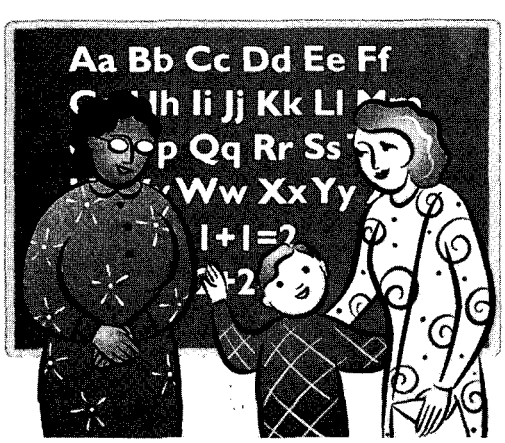
Education policy is jammed up in Washington. But in the states, the proper province of such policy, it was a busy spring, especially for those who want to infuse the K–12 system with a bit of choice.

The Florida legislature passed a statewide scholarship program in late April as part of a broader package to improve the Sunshine State's government schools. Like the students they house, each of Florida's schools will now receive a letter grade based primarily on student test scores. Students assigned to a school that fails in two out of any four years will be eligible for an "opportunity scholarship" worth up to $4,000 to pay for private education, including religious schools. Next year, students from two schools already designated as "low-performing" will be eligible. By fall 2000, as many as 156,000 students from 169 schools will be eligible, according to Florida's Department of Education.

In May, Illinois followed in the footsteps of Arizona, passing an education tax credit. Illinois taxpayers will be able to take $1 off their tax bills for every $4 they spend on private or public education, up to a credit of $500.

The news wasn't all good, as courts proved less enthusiastic about choice than did legislatures. Both the Maine Supreme Court and the U.S. Court of Appeals for the 1st Circuit ruled that Maine, under a voucher program more than two centuries old, couldn't pay for parochial or other religious-based schools.

In May, the Ohio Supreme Court handed down a mixed decision that may send 4,000 low-income Cleveland students back to the very government schools they fled. The court ruled that Cleveland's 3-year-old scholarship program, which allows children to attend private religious schools using tax dollars, didn't violate the First Amendment—a big victory for scholarship proponents. The same ruling, however, invalidated the program, since it had been passed as a rider to a budget bill. According to the decision, that violated the state's "single-subject rule," which prohibits dissimilar items from passing in the same bill. Unless the legislature passes legislation reauthorizing the program, there will be no money for scholarships next year. "I could jump off a bridge right now," Elizabeth Henry, whose daughter attends a Catholic school through the program, told *The Columbus Dispatch*. "This program means everything to us."



Balance Sheet

By Jeff A. Taylor

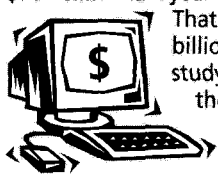
ASSETS

△ **Pagan Rights.** America's largest domestic military base, Ft. Hood, Texas, makes peace with a coven of Wiccans. The base allows observance of Wicca rites by personnel as part of a policy of respect for minority religions. As long as observance does not interfere with their duties—attending rites "skyclad," i.e., buck naked, is out—the Wiccans can do as they please.

△ **Rising Son.** Thanks to Viagra, Japanese women can now buy birth control pills. The government had kept the pill off the market for several suspect reasons, including moral damage, unnamed side effects, and imagined environmental harm. After the Health Ministry approved Viagra in a matter of months—it had been studying oral contraceptives for nine years—women's groups demanded the pill. Currently one in five pregnancies in Japan ends in abortion.

△ **Web Buffs.** Technology trumps weak-kneed corporate self-censorship. After the WB network, in a fit of post-Littleton histrionics, pulled the season finale for *Buffy the Vampire Slayer* from U.S airwaves, Canadian and European fans posted the entire episode on the Internet.

△ **Net Gains.** The Web may not just be full of hype, geeks, and spam after all. A study finds that U.S. companies generated $301 billion last year from online-related goods and services. That puts the Web hot on the heels of the $350 billion auto industry. The University of Texas study also found that between 1995 and 1998 the Internet economy grew by 174.5 percent, compared with GDP growth of 2.8 percent during that time.



Out to Launch

By Charles Paul Freund

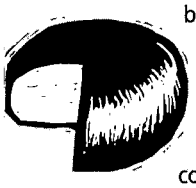
One newsworthy event actually happened during NATO's 50th anniversary summit in Washington this spring. On April 24, President Bill Clinton departed a NATO meeting in such a rush that he left behind a crucial member of his entourage. Abandoned on the streets of downtown Washington was one of the president's military aides. Chained to that aide's wrist was a briefcase. In that briefcase were a telephone link to the Pentagon and the launch codes for the nuclear arsenal of the United States.

Popularly known as the "nuclear football," this briefcase is the world's most important piece of luggage, and its most dangerous. By careful design, it is always in the vicinity of whoever is president. The arrangement, which dates to the Eisenhower years, serves a double purpose: First, the president may need to use the briefcase at any time. Second, it is essential that no one but the president have access to the football.

So how did the forgotten aide with the briefcase get back into the president's vicinity? Did a White House limo, or military vehicle, or Secret Service sedan come screeching to a halt at the aide's last-known location? Did security personnel deploy frantically in search of him? Actually, no. Nobody missed him. When he realized he'd been forgotten, the aide decided to hoof it back

▼ School Daze. Public school administrators around the country react to school shootings with a rash of suspensions, expulsions, strip searches, and general harassment of any student deemed to be a "threat." Among the scary behaviors: drawing a picture of a gun, dyeing one's hair, commiserating with other misfits, and writing stories that mention bombs.

▼ Cheese Stop. U.S. cheese makers go protectionist. The National Cheese Institute asks the World Trade Organization to ban the international trade of cheeses made from unpasteurized milk. That standard would effectively ban trade in the pungent, tasty cheeses that adults crave when they feel peckish. WTO would then be a supranational negotiator on the vending of cheesy comestibles.



▼ No Diving. The men's swimming and diving team at North Arizona is the latest to be sacrificed at the altar of Title IX, the federal writ of collegiate athletic equality. Barring a sudden increase in football-playing women, male gymnasts, swimmers, and even baseballers risk having their sports dropped in a vicious zero-sum game.

▼ Auto-Spin. President Clinton goes on *Good Morning America* to advance what he calls the "common sense" idea that guns should be registered just like cars. At last check there was no federal DMV, no waiting period to buy cars, and no limit on the number of cars you can buy. Nor do the feds monitor car sales between individuals. Yet Clinton, Sarah Brady, and other gun grabbers continue to make the analogy.

LIABILITIES

to the White House on his own, briefcase in hand.

It was a half-mile stroll through downtown D.C., a lively place that would have given him plenty to think about. For example, he would have passed near an old E Street building being torn down, where a skeleton had just been found: that of a soldier missing since 1961. What happened? Who knows? The aide would also have passed near the theater on F Street where *Pickup on South Street* had played back in '53. In the film, Richard Widmark picks a woman's purse, not realizing she's a Red spy carrying stolen secrets, and finds himself hunted by every security force in the world. The aide would have passed numerous capital sites associated with planned political kidnappings, attempted assassinations, and many other exciting events. No doubt the aide tried to make himself seem unexceptional, waiting casually at all the "Don't Walk" signals. He eventually applied for entry at the White House gates, to the certain amazement of security.

"We are safe," the president's spokesman, Joe Lockhart, assured the press. "These things happen."

Do they? In fact, Jimmy Carter once put the nation's nuclear launch codes in his suit pocket, then sent that suit to the cleaners. These things happen all right, but only to very special presidents. The military probably changed the launch codes on both occasions.

Undiscovered Country

By Jesse Walker

Buzzwords such as *sprawl* and *smart growth* have seeped into Washington politics, as Al Gore and other pols attempt to assemble a national consensus on land use policy. But anyone hoping to fashion a sensible program to deal with the by-products of growth will have to get around a pretty big obstacle: After years of study, hardly anyone can agree just what the effects of sprawl, for good or for ill, really are.

For evidence, examine *The Costs of Sprawl—Revisited*, a new report sponsored by the Federal Transit Administration. In 268 pages, it reviews virtually all the serious research on sprawl done during the last several decades and ▶

QUOTES

"We do not want to forget Mengele's crimes, but we should also not forget that Dachau prisoners were forced to produce organic honey and that the SS cornered the European market for mineral water."
—Historian Robert N. Proctor, author of *The Nazi War on Cancer*, in the May/June *Lingua Franca*. The magazine praises Proctor for documenting how "the Third Reich promoted a series of public-health measures that might well be called forward-looking: banning smoking in certain public places, running an aggressive antismoking propaganda campaign, and placing restrictions on how tobacco could be advertised."

"Our blood is not as ready as our mouth. Such self-awareness, while humbling...can serve to inhibit those acts of programmatic compassion that all too few of us ever feel to the quick."
—Norman Mailer, in a widely reprinted May op-ed piece on U.S. involvement in the Balkans

BRICKBATS

◆ Want to use a public restroom in San Francisco? You may have trouble. The city installed 20 new street toilets at public expense, but they have become havens for junkies who want to shoot up. The French firm that made the toilets warned the city that would happen if they used large booths. Indeed, the makers recommended the smaller models they've installed throughout Europe with few problems. But the city opted for the larger version, saying the others were too small for people in wheelchairs to use.

◆ The Iranian city of Ramsar has banned women from riding bicycles, even if they are covered from head to toe as required by Iranian law. Conservatives fear that bicycles give women too much freedom to move about and hence will lead to promiscuity.

◆ When the Mayfield, Ohio, school system hired Brian Hug to help make sure its computers were Y2K compliant, they thought they'd gotten someone more than capable of doing the job. They didn't figure on state and local laws barring the employment of anyone under 14. Hug is apparently quite computer savvy, but he's just 11. So it looks like he'll have to forego the $5.15-an-hour job.

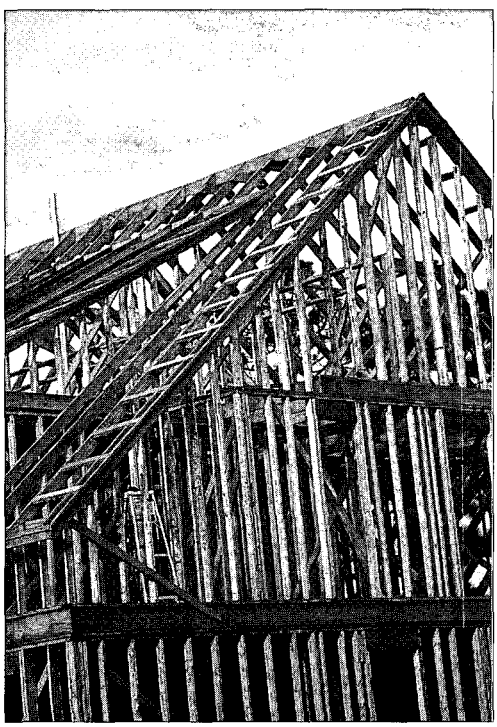
Henry Payne

"I CAUGHT THIS TURKEY MARKETING VIOLENCE TO KIDS, YER HONOR!"

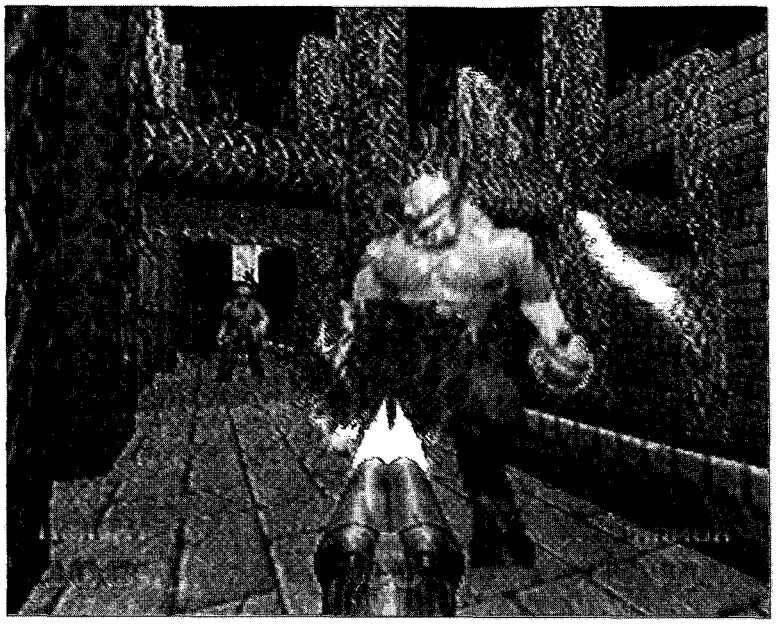
attempts to distill all the areas of agreement it can find. In its words, it seeks "to break down the phenomenon of sprawl into its basic alleged impacts, both positive and negative, and to detail deliberately the strengths and weaknesses of each impact statement with specific citations from the literature." If you're looking for a clear picture, expect to be disappointed.

For example: While there is general agreement that the cost of infrastructure is linked to the density of new development, researchers are in far less accord as to how much this has to do with sprawl, and many make the very reasonable argument that subsequent waves of development will fill in enough areas to recoup the initial costs. How legitimate is this argument? It's hard to say, since hardly anyone's tried to tabulate the relevant data or, for that matter, to decide just how the data should be tabulated. That raises another point, which the study neglects: whether the values in question are too subjective to be quantified at all.

Usually, scholars can't arrive at even that much consensus. Consider the issue of public operating costs—that is, whether the splintered mini-governments that characterize suburban sprawl are "duplicative" and, thus, spend public money inefficiently. This is a popular contention within the smart growth crowd, but there turns out to be little real evidence for it. As the study notes, public services in large and dense areas "are more complex and individualized than those in smaller, more sparsely populated jurisdictions." Given that the smart-growthers haven't tried to measure the quality of the services in question, there isn't much one can say with certainty about the relation of public operating costs to sprawl.



Does the research concur on *anything*? Yes, but even here the interpretations often differ. Just about everyone



Game Theory

President Clinton's million-dollar federal inquiry into the marketing of "violence" to kids targets such video games as the notorious Doom (pictured at left), among other media products. "We can no longer ignore the well-documented connection between violence in the media and the effects that it has on children's behavior," Clinton said in June.

In fact, what makes games like Doom, Quake, and others so popular is that kids can script them on their own computers, creating their own experience within the games by creating their own levels of adventure. Doom's aficionados are not simply game players. They are game designers.

Game consoles will soon feature the same ability as PCs. Sony's powerful PlayStation2, due out next year, lets owners create and play digital games in real time. Director George Lucas, who owns a computer game company, is eager to develop games for the new machine. "But," he complains, "you can't bring it into the country because it's classified as a supercomputer!" Lucas thinks the new PlayStation2 is superior to the equipment used to make *The Phantom Menace*. Its real effect on children may well be to train them to be movie moguls.

—Jeff A. Taylor

agrees that the number of vehicle-miles traveled has been increasing. According to some scholars, however, commute times have nonetheless remained constant. Almost by definition, sprawl eliminates farmland and environmentally fragile territories. Just how much it eliminates, however, is again a point of dispute. And while sprawl is clearly linked to congestion, no one's sure whether the congestion's been getting better or worse. Or, rather, lots of people are sure; they're just sure of radically different things.

It gets worse. According to the report, few analyses of sprawl adequately define such basic terms as *density*, *land consumption*, and *sprawl* itself. Needless to say, this leads to some basic accounting problems. "Take, for instance, land consumption," the authors write. "Although it is a tautology that development consumes land, does a single-family home built on a 50-acre farm 'consume' all of those 50 acres? If it consumes only a fraction, on what basis is that fraction apportioned?"

The authors further comment that few scholars have undertaken any comprehensive empirical analyses of sprawl, that those who have done so have neglected important questions, and that most of the literature looks at only a limited time frame. They also note that "even the most current literature on sprawl tends to *describe* its attributes rather than *quantify* them." By the time they get to accusing scholars of using simplistic models, one gets the impression not only that we don't know much about suburban growth now but that we never will.

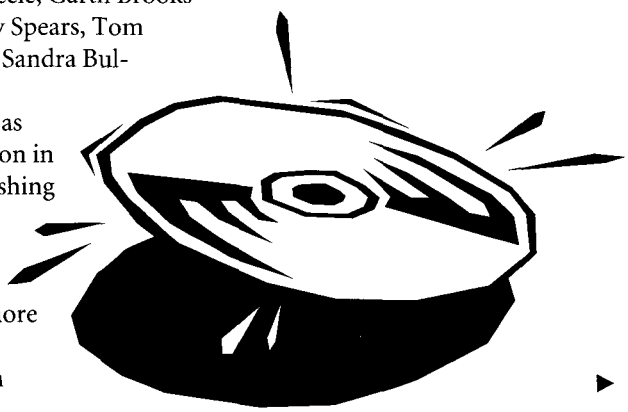
Chances are small, of course, that Al Gore's army of wonks will let that stand in their way.

Label Union

By Brian Doherty

The December merger of record labels owned by PolyGram and Universal predictably provoked laments that corporate suits are once again slaying Art on the altar of Commerce. Big Culture is fast supplanting Big Brother in the nightmares of many intellectuals, who are increasingly haunted by visions of book, record, and video stores that contain nothing but John Grisham and Danielle Steele, Garth Brooks and Britney Spears, Tom Cruise and Sandra Bullock.

But just as consolidation in book publishing has coincided with the availability of more and more books from more and more publishers, the merging of two of the Big Six record labels is unlikely to restrict the options of consumers, artists, or even fired executives, most of whom leave with very comfortable compensation packages—and plans to start independent labels of their own. Indeed, far from representing an aggressive attempt to corner the music market, the PolyGram-Universal merger can just as easily be read as a rearguard action to shore up power in a rapidly decentral-



BRICKBATS

● John Bothe has an unusual job for someone who claims that compulsive gambling once nearly ruined his life: He's the announcer at the Meadowlands Racetrack in New Jersey. The track asked Bothe to start announcing the odds of races over in-house TVs set up for patrons. Bothe, fearing talk of odds could ignite his problems once again, refused. So the track cut his pay. Bothe is now suing his employers claiming that his gambling addiction is a disability that they have to accommodate by restoring his pay without requiring him to announce the odds.

◆ Micahun Johnson, a student at Southern Utah University, had to write a paper on censorship. While doing research on the Internet at the school library, she went to a Web site with erotic images. The computer lab monitor told her to close that page. She did, and soon her searches took her to a site with photos of Adolf Hitler and Benito Mussolini. That prompted the lab monitor to kick her out. It seems Johnson violated a school policy barring students from viewing "objectionable material" on the Internet, even if similar material is available on library shelves.

Chip Bok

izing industry.

Over the past few years, the rise of MP3 (a technology that allows bands to upload CD-quality sound to the Web), the proliferation of independent labels (a function of cheaper recording technology), and more-accessible distribution systems have all put more power into the hands of artists, not major labels. In fact, as alternative music journalists have started pointing out with glee, with the exception of the very biggest acts, most bands get little out of being signed to a major label other than the chance to play around in an expensive studio and eat a meal or two in a fancy restaurant—perks that are charged against future album sales anyway. With the huge overhead and stacked accounting practices of big labels, few artists have reason to weep about being dropped, or passed over, by the majors.

Similarly, music fans have little reason to worry about record mergers. Despite some consolidation at the top of the industry, consumers will continue to benefit from more choices offered by more labels. There is less chance than ever that one record executive, or even a cabal of them, can summarily decide that some band's music should not have the chance to reach a potential audience.

Contract Clause

By Mariel Garza

A big reason charter schools are so successful is that they can work outside of the typical school bureaucracy. That allows them the freedom and flexibility to create innovative programs tailored to the needs of their particular students.

Such latitude, however, is exactly what scares the hell out of those opposed to charter schools. And where fear and political clout meet, there is legislation. That's what happened in California this spring when the state's burgeoning charter school movement faced a potentially lethal challenge: a bill that would have forced charter schools to join the teachers union and operate under the existing contracts in their districts. Proponents of the

law, including the state's biggest education union, the California Teachers Association, presented it as a benign measure that would simply extend to charter school teachers the same rights enjoyed by conventional public school teachers.

Charter school advocates responded immediately, pointing out that the defining characteristic of charter schools is precisely that they are exempt from the usual requirements. Besides, they added, many charter school teachers already operate under a union contract. Even Oakland Mayor Jerry Brown, who as governor of California supported unions, vowed to fight the bill to the bitter end. The message got through to lawmakers in Sacramento, and by June the legislation's teeth had been pulled. The CTA and charter school proponents made a compromise that put into words what was already in practice: Charter teachers can organize into unions if they want to, but they don't have to.

The fight was short but important, says Sue Bragato, executive director of the California Network of Education Charters. If it had passed, "it would have closed schools down," she says. California approved charter schools in 1992 and last year increased the number of charters allowable to 250 in 1999. Some of these will be brand new schools, but many will be traditional public schools that convert to charter status. Bragato believes that the CTA is running scared as charter schools become less of an experiment and more of an established alternative to public schools. After all, she points out, if more schools open or convert with no official union requirement, the CTA stands to lose a lot of money.

That's one reason this latest anti-charter skirmish is unlikely to be the last. Indeed, even as they vanquished union-sponsored legislation, charter school advocates were fighting against an attempt to stop funding for charter schools that are not based in classrooms, such as home schools.

DATA

Taken to the Cleaners

By Michael W. Lynch

For the government, there's no tax like a hidden tax. That's why a considerable chunk of the total taxes we pay is hidden. In February, *The Washington Post* itemized the costs that go into the $1.10 a person might pay to have a shirt professionally laundered. Setting aside the sales tax, the *Post* estimated Uncle Sam's take at 4 cents—a whopping two-thirds of what they estimated to be the owner's 6 cents in profit. Some might conclude that this isn't so bad. After all, by this math, the government added a mere 3.6 percent to the pre–sales tax cost of the clean shirt. Not exactly, say economists Gary and Aldona Robins of the Texas-based Institute for Policy Innovation. They took the *Post*'s analysis one step further, estimating the proportion of each cost factor that can be pegged to federal taxes. The *Post*'s calculations, say the Robinses, underestimates the total tax bite—37 cents—by close to a factor of 10. Since even a third of the profit is really tax, Uncle Sam is the one cleaning up, with a take nine times greater than the owner's.

The Cost of Cleaning a Shirt

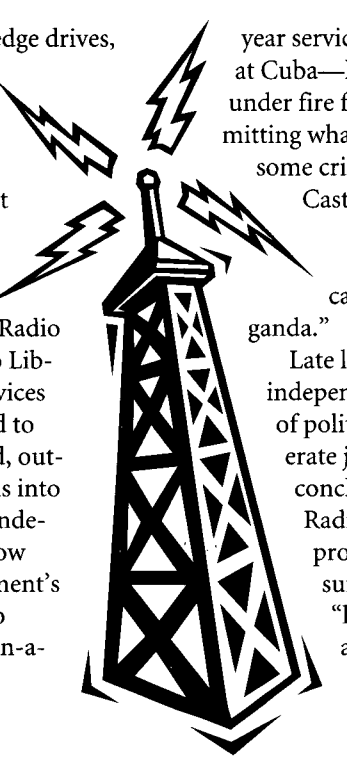
	Total Cost	Federal Taxes
Labor	$.43	$.13
Payroll taxes	.04	.04
Rent	.12	.04
Supplies	.09	.03
Depreciation	.09	.03
Utilities	.07	.02
Insurance	.04	.01
Office & administration	.04	.01
Repair & maintenance	.03	.01
Advertising	.03	.01
Interest & bank charges	.03	.01
Claims & miscellaneous	.03	.01
Profit	.06	.02
TOTAL	**$1.10**	**$.37**
Tax Rate		33.6%

Sources: *The Washington Post*, Gary and Aldona Robins

Hack Radio

By Jesse Walker

The phrase *public radio* usually sparks thoughts of NPR, with its pledge drives, symphonic hit parade, and middlebrow commentary. But the federal government devotes a much larger share of its budget to the Voice of America, Radio Free Europe/Radio Liberty, and other services putatively designed to broadcast balanced, outside news programs into countries lacking independent media. Now one of the government's operations—Radio Martí, a $23 million-a-year service beamed at Cuba—has come under fire for transmitting what even some critics of Fidel Castro have labeled "pathological propaganda."



Late last year, an independent panel of politically moderate journalists concluded that Radio Martí's programming suffered from "lack of balance, fair-

BRICKBATS

◆ Lexington, Massachusetts, is planning a big celebration for the 225th anniversary of the Battle of Lexington next year. But a planned re-enactment of the skirmish may have to be ditched unless a new state law is changed. The law requires trigger locks and gun lockers for firearms. The extra-long muskets the actors use can't fit into the typical rifle locker, and the trigger locks the state requires would clash with the realistic uniforms. An even bigger problem is getting carry permits for all gun-toting participants. These problems are so large that the group that performs the battle, the Lexington Minute Men, had to attend the governor's inauguration without their weapons.

◆ With the European Union contemplating cutting back subsidies, some ranchers and farmers may have to find other lines of work. But don't worry about the livestock, especially in Italy. Many of those animals are little more than figments of the imagination. The Italian Agriculture Ministry found that a full 41 percent of the sheep, goats, and cattle claimed by that nation's farmers don't exist. When they applied for subsidies, farmers would borrow each other's animals to make their flocks seem bigger. Inspectors only caught onto this when they started tagging animals with paint to make sure they didn't miscount.

—Charles Oliver

Scott Stantis
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ness,...objectivity...and adequate sourcing." They also accused the station of "confusing packaging" and "poor news judgment in story selection." This February, a lengthy federal investigation came to the same conclusion, finding that Martí's fare often fails to meet the International Broadcasting Bureau's news-gathering standards. Critics accuse the station of being virtually indistinguishable from Cuban exiles' talk shows airing on commercial radio—suggesting that the channel may be superfluous as well as journalistically dubious. Radio Martí's first news director, Jay Mallin, recently told the *Miami Herald* that the service is "out of control and very unprofessional."

Meanwhile, a new study by the State Department puts Martí's regular audience at only 9 percent of Cubans polled—a low estimate no doubt, given the difficulties of accurately polling the subjects of a dictatorship, but still only half the audience found in a similar survey conducted five years ago.

While Martí has had detractors since it went on the air in 1985, things took a clear turn for the worse in 1997, after President Clinton appointed Miami lawyer Herminio San Roman to run the operation. Despite its shaky professional reputation and leaking market share, Martí has its defenders, most prominently Secretary of State Madeleine Albright. "The Clinton administration supports your efforts," she told Martí's staff at a recent ceremony. "We will fight for your budget. We will defend your mission." Even, it seems, if no one actually wants to listen to the station's product. ◆

☛"Nations, races, and groups don't cause problems, individuals cause problems. The world isn't in a mess, people are in a mess."

—from "The Avenging World"

☛"The essence of the crisis in the air...[is that] political control of airports, airways, and airlines prevents the normal market mechanism from operating. It is impossible to determine the true demand for air navigation service, since the users...[and] the airlines...do not pay for it."

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No Escape

In which our man in Washington looks longingly at the exit doors

By Michael W. Lynch

Date: Wed, May 19, 1999 7:03:44 AM
From: mlynch@reasondc.org
Subj: The Religious Right Regroups

I found myself at the American Enterprise Institute last Thursday, in search of a free lunch and a panel discussion on religious conservatives and American politics. I was only half successful. I signed up too late for lunch, but there were plenty of seats for the lectures.

As I've noted before, Washington's religious conservatives are engaged in a bit of introspection, due to a widely circulated letter from Paul Weyrich calling for a retreat from politics and a book by Cal Thomas and Ed Dobson that I gather does much the same. This is how "intellectual/political" movements sort themselves out here. Just as the William Kristol/David Brooks article on national greatness spurred myriad followup articles and set conservative and libertarian big-think conference agendas for many months, these more recent documents are giving religious activists something to think and talk about. Hence the day's forum: "Terms of (Dis)engagement: Religious Conservatives and American Politics."

The event started out slow, as moderator Keith Pavlischek plodded—and I mean *plodded*—through his "brief" opening and speaker introductions. "This is the reason these events get bad raps," I wrote in my notebook, as I looked for an exit door.

Fortunately, Fred Barnes of *The Weekly Standard* and Fox News Channel was soon up to speak. His remarks centered on twin theses: Christian conservatives have been widely successful, and politics hasn't pulled the faithful away from the churches and into black tie political receptions. His one caveat was that being on TV "is a narcotic," which he knows from personal experience. Jerry Falwell is on TV too much, he said, and "has become in some cases a patsy for politicians."

Next came Paul Marshall, a rather frigid-looking fellow who is currently working on a "World Survey on Religious Freedom" for Freedom House. When he declared that, in the interest of time, he would simply read his remarks, I again started looking for the exit. But Marshall grabbed my attention with his witty, at times cutting, and insightful comments. He called Weyrich's letter "1,000 words in search of a thesis" and quoted a review of Dobson's book that advised: "This is not a book to be put aside lightly. It should be thrown with great force."

Like Barnes, Marshall denied everything. He claimed that even the high-profile leaders, such as James Dobson, James Kennedy, and Pat Robertson, put most of their energies into their churches, media outlets, universities, and other do-good projects—not politics. He then offered some historical perspective. "The call for separation is not the slightest bit new or the slightest bit unusual," said Marshall. "It is merely the repetition of pervasive, parochial, and pathological patterns which have afflicted American evangelicalism throughout most of history."

Marshall said that Christians become motivated only when they feel beleaguered by a hostile culture. They then set out on a crusade to right the wrongs of the world. The crusade is populist, cast as the "little guy, the decent, honest, hard-working American against distant elites who manipulate the country for their own selfish and nefarious ends." The campaigns are against, rather than for, something. "It can be anti-slavery, anti-Masonic, anti-Catholic, anti-alcohol, anti-evolution, anti-secular, anti-communist—but it is very hard to know what it is for except for a general morality and decency."

The result, according to Marshall, is a burnout of leaders and troops who soon "head for the hills," exactly what he sees Weyrich, Thomas, and Dobson calling for today. This retreat is caused, he argued, by a failure to take government seriously as an ongoing pursuit requiring hard work, rather than a temporary tool to solve immediate and discrete problems.

Said Marshall, "Government and politics is an ongoing, necessary, unavoidable, inescapable, persistent feature of human life." Politics cannot create a utopia, but it is important. There is no final crusade to end all crusades. Just the day-in and day-out work of keeping an eye on our Washington overlords.

This may surprise some of you, but I am coming to see the religious right and libertarians as similarly situated vis-à-vis politics. Both groups are composed of people who distrust government, view it as inherently corrupt and verging on illegitimate, and would prefer not to see, touch, taste, or smell it—ever. The problem, of course, is that government tends to show up on one's doorstep, uninvited, like a slobbering St. Bernard or perhaps an elephant on the verge of a bowel movement. Just ask Microsoft, a company once famous for keeping its distance from D.C. The religious right was spurred to action when the IRS started poking around its schools.

The question, for Christians as well as libertarians, is whether Marshall's vision of eternally tedious vigilance is enough to keep the troops motivated, sending money, and bugging politicians. The left

HENRY PAYNE

"To most American eyes, these look like poverty neighborhoods, but this is the snapshot view; in the video version

they are the first frames on the way to prosperity,

the first way-station on the Santa Ana and San Bernardino Freeways to middle-income American comfort."

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is perpetually engaged because it wants something desperately—your money and your children's minds.

All five panelists agreed that religious conservatives should stay engaged in politics, which of course is the status quo. No one wanted to defend, or flesh out, Weyrich's letter. AEI's Hillel Fradkin, on hand to offer comments on the main presentations, threw out one loopy idea. Noting that the left has been successful pushing its agenda in the courts, he suggested forming an "alliance between trial lawyers and the Christian Coalition" to sue purveyors of popular culture. Hollywood's product, he reasoned, is just as dangerous as secondhand smoke. If the public health nuts and lawyers can get big tobacco, cultural conservatives and lawyers ought to be able to get Hollywood.

On my way out, I passed through the secondhand smoke of Judge Robert Bork, who was enjoying a Kent at the back of the room. I introduced myself, telling him I'm a big fan largely because, as someone who is constantly smoking and wisecracking, he reminds me of my grandfather. I asked him what he thought of Fradkin's idea. It'll never work, he exhaled, adding that the cultural elite would never sign on. Thank God, I thought, as I headed for the hills.

Date: Fri, May 21, 1999 3:15:55 PM
From: mlynch@reasondc.org
Subj: Evening Beat

I worked evenings this week. The American News Women's Club hosted its annual dinner Tuesday night, a toast and roast for CNN's Larry King. Mary Matalin emceed the event, and the roasters were a distinguished bunch, including F. Lee Bailey, Sen. Fred Thompson (R-Tenn.), and veteran UPI White House correspondent Helen Thomas. I found myself at the Four Seasons in Georgetown, a Heineken in hand, sometime after 6:30 p.m. It was all quite pleasant, until the formal program started.

Note to event planners: If it's a roast you're after, don't book a current TV interview show host as the roastee and a bunch of publicity hounds as the roasters. What you'll get is a giant butt-kiss—the roast version of a Larry King interview.

The roasters rotated from the present to the absent, mostly ex-presidents, who sent their love by letter. Matalin had the painful job of reading these toasts—none were roasts—and none said anything the least bit interesting.

There were the obligatory references to King's wives. "He never met a man he didn't like or, for that matter, a woman he didn't love," said Hollywood producer Michael Viner, in a typically gut-busting line. The only people who were consistently funny, and harsh, were Matalin, who at one point said she "felt like a NATO general apologizing for all of these bombs," and former Texas Gov. Ann Richards, whose accent and hair alone would have kept us laughing.

It also occurred to me that this is the perfect Washington event. It captures the essence of both the nanny state—get yourself tested and tell a friend—and the regulatory state—I'm from the government and I'm here to give you a digital rectal exam.

The night's most painful presentation came from Sally Quinn, Georgetown society hostess and *Washington Post* style maven. Quinn revealed that she had sought advice on her roast from her funny friends—two comedy writers, a Broadway writer, and a Clinton speechwriter. She must have gotten voicemail.

Quinn just couldn't seem to get past talking about herself, and the results were less than uproarious. She described the time she invited King to her famous New Year's Eve party, where he was unable to hold a conversation with anyone. He told her afterward that he was shy. She told the audience how Larry fell asleep during an on-air radio interview with her seven years ago. This, by the way, was supposed to reflect poorly on King. She kept talking about her parties, her books, and her husband, the *Post*'s Ben Bradlee. After dropping his name numerous times, she chastised King for actually introducing her one time as "Mrs. Bradlee." Can you believe it?

The event ended well, which is another way of saying it ended. By having the birthday closest to Larry's at my table, I got to take the centerpiece home to my Lovely Wife, along with a goodie bag that included an array of fancy lotions and a keychain whistle for safe navigation of D.C.'s streets.

Wednesday night, I headed to the Hill for one of those can't-miss Washington receptions—a screening of the hot new documentary *Prostate Cancer: A Journey of Hope*, and the unveiling of a new postage stamp, inscribed with the male circle-and-arrow symbol, "Annual Checkups and Tests," and "Prostate Cancer Awareness."

As I stood leafing through the press materials, drinking a Michelob Light, and watching the waiters circulate mozzarella kabob appetizers to the 100 or so guests, I thought to myself: "This is why it's great to live in Washington. We find out first about everything of national importance." The rest of America won't see the postage stamp for another 10 days and won't catch a glimpse of the documentary until well into next month.

It also occurred to me that this is the perfect Washington event. It captures the essence of both the nanny state—get yourself tested and tell a friend—and the regulatory state—I'm from the government and I'm here to give you a digital rectal exam. Even the most unappetizing of topics—limp and leaky penises, castration—is an occasion for free food and drink, and, of course, calls for more federal spending. The National Cancer Institute's executive director, Dr. Jill O'Donnell-Tomey, said she "hoped the lawmakers here would help us by allocating more federal funds for research." As for the Fourth Estate, she wants us to "help publicize it." Hence this e-mail.

Although I left before the entire 16-minute screening had finished, I was struck by the optimism expressed in the footage I was privileged to see. One man dolefully described the disappearance of his sex drive upon entering treatment. His wife, however, was less concerned. "It's fine for me," she said, "but that's just a woman's point of view."

With that, I knew it was time to hit the exit.

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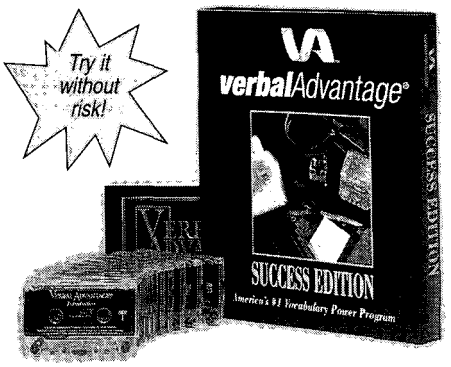

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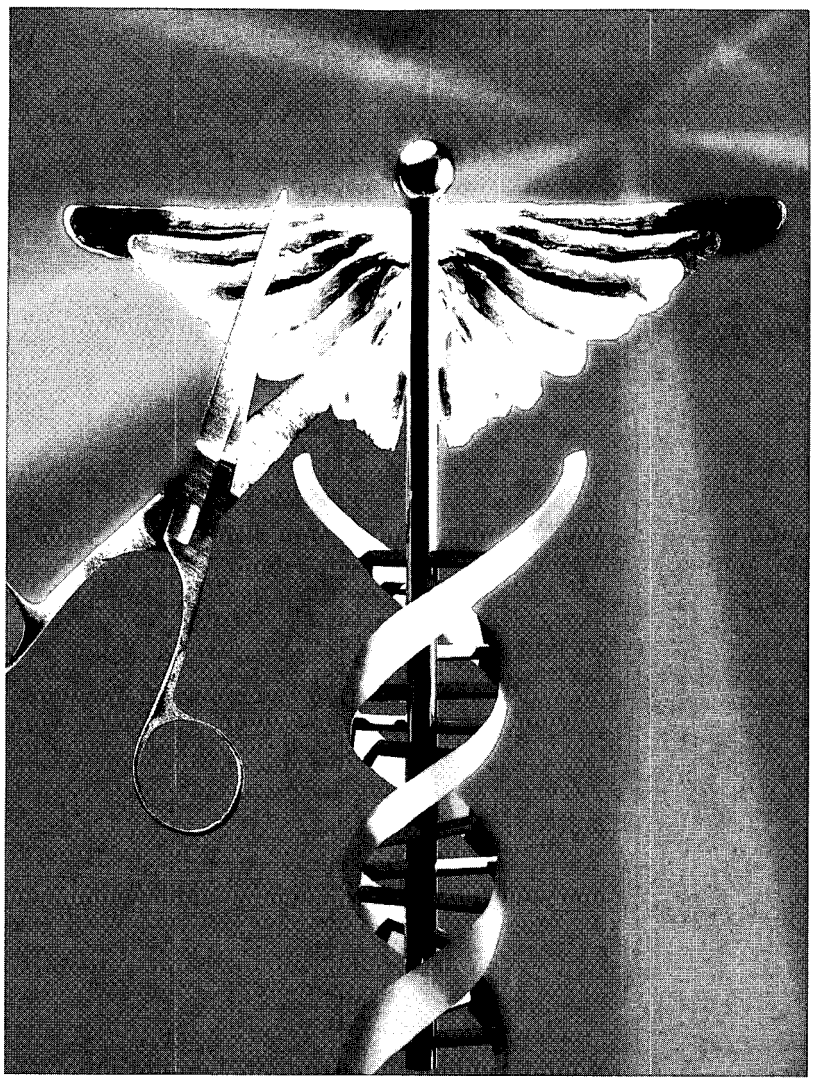


The moralists' attack on medical progress and patient freedom

By Ronald Bailey

In 1996, a 28-year-old breast cancer survivor named Joy Simha decided to take the new genetic test for the breast cancer gene BRCA1. If Simha tested positive for the gene, she would face a 50 percent to 85 percent chance of her breast cancer recurring or of developing ovarian cancer in her lifetime. As a preventive measure, she planned to have her remaining breast removed. But her oncologists at Sloan-Kettering Memorial Cancer Center in New York refused to tell her the results of her own test.

"It was just a very paternalist attitude," Simha says now. "They kept telling me, 'We really feel that the results could be dangerous if they are revealed to you at the wrong time.'" So Simha took her frustration to the press. "If I did not want to know the results of my tests," she wrote to *The New York Times Magazine*, "I would not have given the doctors my blood."

By refusing to reveal such test results to their patient, Simha's doctors believed they were practicing medicine at the highest ethical level; keeping patients in the dark in such circumstances has been recom-

JAY KOELZER

mended by such prestigious bioethics authorities as the University of Southern California's Pacific Center for Health Policy and Ethics. "The test for BRCA1 should be confined to the research setting," declared the Pacific Center's report on the matter in 1996. The USC panel advised women not to take the commercial test for BRCA1 because "there are no known methods for preventing breast or ovarian cancer that would be particularly important to women with versions of these genes."

Nor is the Pacific Center alone in its opinion. In 1998, George Annas, director of the Law, Medicine, and Ethics Program at the Boston University Schools of Medicine and Public Health, conceded that the carrier of the BRCA1 gene has a high risk of contracting breast cancer. Nevertheless, he argued in his book, *Some Choice: Law, Medicine, and the Market*, "Since there is no way to prevent this disease, what good is knowing you will probably get it in the future?" Francis Collins, the director of the Human Genome Project, agreed in U.S. Senate testimony in 1996 that the BRCA1 test should not be commercially available to women. According to Collins, the information that a woman might get from such a test is "toxic."

Bioethics began in a very different spirit. It was born in the 1960s as a counterbalance to "doctor-knows-best" paternalism. Then, it focused on increasing the autonomy of patients in their relations with doctors, hospitals, researchers, insurers, and government agencies.

But Simha's story has a happy ending. As a result of the press attention, her doctors relented and gave her the test results. She had tested negative, and she dropped plans for another mastectomy. Far from having a "toxic" result, the test actually helped Simha avoid another dangerous and painful procedure.

Furthermore, the Pacific Center was wrong in stating that there is no way to avoid breast cancer. A Mayo Clinic study published in January in *The New England Journal of Medicine* found that "surgery that removes the breasts as a preventive measure before the appearance of cancer reduces the risk of breast cancer by approximately 90 percent for women at moderate to high risk for the disease." That is precisely the treatment that Simha had planned. But though the Mayo study is important, it is beside the ethical point: Even in the face of medical uncertainty, such decisions should be up to Simha and other at-risk women, not a panel of imperious bioethicists.

Bioethics is a growth industry. During the past 30 years, more than 165 such centers and programs have sprung up, many of them associated with university medical schools. As Simha's case shows, bioethical pronouncements have real consequences for real people. Increasingly, bioethicists are shaping the choices that you and your family will have for future medical treatments.

The federal government has also gotten into the bioethics act. In 1989, the Ethical, Legal, and Social Implications (ELSI) program was established as an integral part of the Human Genome Project, the joint effort by the National Institutes of Health and the Department of Energy to decipher the complete genetic code of human beings. ELSI receives about 5 percent of the annual Human Genome Project budget, or between $5 million and $6 million per year, and claims that its funding "currently represents the largest single investment in bioethical research from any one source." In the past 10 years, ELSI has awarded grants that have produced more than 150 studies, reports, books, and even NPR and PBS programs.

In 1995, President Clinton, at the urging of Vice President Gore, established the National Bioethics Advisory Commission, whose 17 members include seven professional bioethicists. The NBAC, headed by Princeton University President Harold Shapiro, has issued a string of reports, most famously its recommendation that a five-year ban be imposed on efforts to clone human beings.

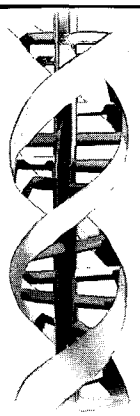
In January, Gore announced at the annual meeting of the American Association for the Advancement of Science that the administration plans to increase direct federal funding for bioethical research by $10 million. While such amounts may sound small, they leverage a lot of power. And that power is growing at the expense of individual choice.

A self-conscious marriage of philosophy and policy, bioethics began in a very different spirit. It was born in the 1960s as a counterbalance to "doctor-knows-best" paternalism. Then, it focused on increasing the autonomy of patients in their relations with doctors, hospitals, researchers, insurers, and government agencies. Early bioethicists successfully challenged researchers to be more respectful of their patients/subjects and demanded that they obtain informed consent before treatment or experimentation.

The field received a major boost in the early 1970s, when it was revealed that doctors working with the U.S. Public Health Service had enrolled 399 black men in Tuskegee, Alabama, as part of a study that followed the course of their syphilis infections without treating them. The resulting scandal underscored the urgent need for better protections for research subjects and

led to the expansion and strengthening of the institutional review board (IRB) system. All federally funded research using human subjects must receive approval from an IRB that makes sure the benefits of the research outweigh the risks and the researchers have obtained the informed consent of the subjects. Today, there are some 4,000 IRBs reviewing research proposals. While not perfect, the IRB system has been an effective mechanism for protecting patients and research subjects.

But as the Simha case shows, many bioethicists are now rediscovering the virtues of paternalism. This time, bioethicists themselves want to determine what patients need to know and what treatments they should get—bioethicist-knows-best, if you will. What they claim to know best is not only that patients' choices should be limited but that social interests should supersede personal considerations and that the mechanism of the market has no place in medical treatment.



Bioethicists are now rediscovering the virtues of paternalism. This time, bioethicists themselves want to determine what patients need to know and what treatments they should get—bioethicist-knows-best, if you will.

For example, genetic testing—the issue in Simha's case—is exploding. More than 450 tests for genetic disorders are now available. This disturbs those bioethicists who have assumed the position that medical ignorance is medical bliss.

"Ninety-nine percent of all of our genetic tests tell you something that there is nothing you can do about for yourself," says Boston University's Annas. He cites the test for Huntington's disease, a devastating degenerative neurological condition that generally strikes middle-aged adults. According to Annas, the test tells a patient, "You're going to die this horrible death, and there's nothing you can do about it." Thus, he says, the tests end up creating pathology in people who are healthy but who now think that they are sick.

But while the availability of treatment may be the only relevant consideration for Annas, patients may have excellent reasons of their own for wanting the information that a biotech diagnostic test might offer them. Instead of debilitating patients, the results may well give them a chance to shape their lives, careers, and reproductive choices appropriately. A man who learns at age 20 that he will contract the dementia of Huntington's in his mid-40s might decide to lead an entirely different life, skipping the corporate grind for any number of alternatives. Or he might choose not to have children so as not to risk passing on the disease.

Telling someone that his chances of early-onset heart disease are greater than average may or may not make him feel worse, but it could well energize him to do something about it: more frequent heart sonograms, cholesterol-lowering drugs, exercise. Annas' view seems to be based on the assumption that everyone is a depressive fatalist.

Gregory Stock, the director of the UCLA Program on Medicine, Technology, and Society, finds the idea that bioethicists would withhold genetic test results from a patient "very offensive." Bioethicists, he says, have "a lack of faith in the individual, essentially."

Genetic testing is not only about disease. Commercial labs now offer cheap, simple, and highly accurate genetic paternity tests through the mail. Simply wipe the inside of a child's cheek with a cotton swab, send it in with $350 to $500, and the results are back in a week or so. The simplicity and lower costs have boosted the number of paternity tests from 80,000 in 1988 to more than 200,000 in 1998. Those seeking paternity tests may have good reason: One-third of DNA paternity tests indicate that the man being tested is not the biological father of the child in question.

Characteristically, bioethicist Eric Juengst, formerly the director of the ELSI program and now at Case Western Reserve, denounces the new paternity tests and asks, "what is the benefit to the child and society of seeking this information?"

"A lot of people have grown up with healthy and stable families in the ignorance of their parental status with no harm done," Juengst told the *Dallas Morning News* in 1998. He added the information "erodes the...unconditional acceptance of our children with all their surprising traits and maybe their genes." He added that "adoptees can testify that there's a lot more to being a family than just genetic links." Of course, adoptive parents *choose* to rear genetically unrelated children; cuckolded husbands may want the option.

More important, Juengst's view is a typical example of how the bioethical community elevates the presumed claims of society over the rights of individuals to choose. A similar claim is made by Arthur Caplan, the director of the Center for Bioethics at the University of Pennsylvania, who has been dubbed "the man to call on bioethics" and "America's most visible commentator on bioethics" by *The Chronicle of Higher Education.* In his 1997 book, *Am I My Brother's Keeper?: The Ethical Frontiers of Medicine,* Caplan makes the remarkable assertion that "assisted reproduction, unlike sexual reproduction, is a social enterprise.

It requires the involvement of many third parties as well as significant amounts of social resources. In ordinary circumstances, individuals do not need society's help to make babies. In extraordinary circumstances, they can only do so with that help. What level of help society is willing to tolerate, provide, or pay for moves assisted reproduction beyond the boundaries of personal choice and individual liberty."

But couples using assisted reproductive technologies don't use "social resources"; they use personal resources. In fact, infertility treatments are not covered by most health insurance policies, so couples pay for treatments directly out of their own pockets. Also, it's not "society's help" that they seek but a doctor's help. And finally, society can "tolerate" a lot more than it is willing to "pay for."

Similarly, Daniel Callahan, co-founder of America's most prestigious bioethics think tank, the Hastings Center in Garrison, New York, argues in his 1998 book, *False Hopes: Why America's Quest for Perfect Health Is A Recipe for Failure*, that "coercive efforts to change unhealthy behavior" are justified because "bad individual health behavior...does harm to others, even if the health risk-takers pay their own health care costs. Money is diverted from other uses, personnel are diverted from other patients, and lives are wasted that could serve us all." Of course, every personal decision diverts money and personnel from one use to another. Callahan's logic leaves no room at all for individual freedom—everything belongs to "society."

"Because of the commercial nature of the enterprise, I think there should be national regulation for the whole fertility industry," says Boston University's George Annas. "Society has an interest in children born through reproductive technology."

Patient autonomy, some bioethicists argue, has gone too far; they rue what they call the "absolutizing of autonomy." Since the free market is the pre-eminent arena for exercising autonomy, many bioethicists harbor a deep antipathy toward it. Indeed, their distrust of the market is at the root of the bioethical opposition to new reproductive technologies.

Bioethicists used to worry about the moral standing of in vitro fertilization (IVF) and surrogate motherhood. Now many of them want to impose regulations on fertility clinics. Why? Caplan thinks "the free market is a dangerous, costly environment for making babies; *caveat emptor* is not a sufficient ethic to guide the creation of new lives." He further asserts in his book that "at a minimum, policies must be put in place stating who can use reproductive technologies, including statements about age, the existence of infertility, and the need for a stable, psychologically fit parent or parents."

Annas agrees. "Because of the commercial nature of the enterprise, I think there should be national regulation for the whole fertility industry," he says. "Society has an interest in children born through reproductive technology. We're the only country that has a market in human eggs, permits payment to surrogate mothers, and lets the private market dictate what's done."

The prestigious magazine *Science* jumped on the regulatory bandwagon last year, when it published an article noting that "unlike other areas of medical innovation, no comprehensive regulatory framework exists in the United States for alternative reproductive technologies." The authors, of course, recommended that "a federal oversight mechanism" be established.

But has this lack of federal oversight resulted in abuses? Caplan cites a few battles involving embryo custody or contested surrogacy, but the truth is that problems have been rare. As for safety, the birth defect rate for IVF babies (150,000 of them have been born) is lower than for children who are born in the normal way.

The vast majority of parents using IVF have gone away happy. It is the same in any market: There are a few operators who defraud their clients or treat them negligently, but in the overwhelming majority of transactions, both parties benefit. New reproductive technologies may be technically sophisticated, but there is nothing so unusual about them that standard ethical and legal principles cannot be used to restrain or punish unscrupulous or careless practitioners. Conventional child protection laws safeguard the rights of children born through IVF, just as they do for any children. Annas and Caplan do not make a strong case for federal oversight of the highly successful and innovative fertility industry.

But their case against the market goes well beyond a call for oversight. "I think that most people in the bioethics field feel that medical care is not a market good," asserts Annas. "Medical care is different from food, clothing, and shelter, all of which are market goods. It's about human mortality and human suffering, and market things are not." Consequently, Annas is a strong proponent of creating a government-financed national health care plan. "I think that that is the number one ethical issue in medicine today," he says.

Callahan concurs. He argues that we should adopt "a steady-state, equitable medicine [that] will have to limit, not expand,

patient choice. It will require frank rationing. It will work to resist patient demands, particularly demands stimulated by market pressure and incentives."

Prominent bioethicists oppose the market in medicine because, they argue, when a person is sick, he or she is particularly vulnerable. Sick people can't make good decisions and can't shop around for the care they need. Money is no object: Patients just want to be cured. Thus, medical care is different from food, clothing, and shelter, all of which are market goods. But is that true? Is a sick person really more vulnerable than someone who is starving, or naked, or stuck outside in the cold?

These same sick people, who are too vulnerable to shop for medical care, are nevertheless able to give informed consent and make life-and-death decisions about their medical treatment, at least according to the original impulse behind the bioethical movement. Indeed, bioethicists advise people to craft advance directives about their medical care so that if they become incapacitated their wishes will be known. But it's apparently too much to expect them to make advance arrangements for choosing and paying for their medical care. There is no reason why most people can't shop for medical care in advance, check out doctors and medical facilities ahead of time, and purchase as much insurance as they think prudent.

"I think that the objections of people like George Annas and Daniel Callahan turn on an unsustainable egalitarianism of envy, or on an unjustifiable abhorrence for the market where the market is seen in itself as being bad," says Baylor College of Medicine bioethicist and physician Tristam Engelhardt.

The bias toward egalitarianism is pervasive among establishment bioethicists. "We should give universal access to a basic minimum of health care before going on to new, more expensive, extreme measures that will benefit only a small portion of the population," says Annas. "With 43 million uninsured, should we be trying to introduce these very expensive procedures into medicine?" Callahan also wants a health care system "in which further scientific gains are not deployed until earlier ones are fully utilized." Translation: No one should get a new treatment until everyone first has access to all of the old treatments.

"I think that Callahan is taking the view that it is more important to suffer than to have inequality," says Engelhardt. "And I think that it's a very implausible view."

Engelhardt contrasts Callahan's "egalitarianism of envy" (taking away a good from someone because others don't have it) with an "egalitarianism of altruism" (providing a good to someone who does not have it). Following the ethical nostrums of Callahan and Annas would prevent people from buying life-saving treatments that they want and can afford. But more important for those of us who cannot afford any given treatment, such bioethical barriers would drastically slow medical advances, because new treatments to which we might gain access in the future will not be developed.

As UCLA's Gregory Stock puts it, "You're getting the rich to pay for R&D. What better research subjects could you have? They are knowledgeable about the risks of the technology and can pay for it."

Daniel Callahan of the Hastings Center argues that we should adopt "a steady-state, equitable medicine [that] will have to limit patient choice. It will require frank rationing. It will work to resist patient demands, particularly demands stimulated by market pressure and incentives."

The issues of patient choice and the future of medical progress converged recently at a meeting of the National Bioethics Advisory Commission. A worried father named Sidney Gunst Jr. testified before the federal body in favor of allowing research on human embryonic "stem cells," which are cells derived from human embryos that have the potential to become any type of tissue. Stem cells could one day be used to cure diabetes and Alzheimer's disease, and to replace damaged tissue. Gunst's 4-year-old son has had open-heart surgery to repair a defective aortic valve, and he will need more surgery when he becomes a teenager. Gunst and many researchers think that stem cell research could lead to better transplant therapies for his son. But he is worried that the NBAC or Congress might try to stop such research.

"Every time a surgeon removes cancer from a patient, rather than letting him die, he plays God," testified Gunst. "Every time penicillin is prescribed to combat infection...or a C-section is performed to ensure a safe delivery; or an organ is transplanted rather than allowing nature to take its course—a doctor is playing God. The history of human survival is the history of man playing God."

Gunst is right to be concerned. Although sentiment on the commission generally favors stem cell research, some NBAC members have expressed reservations about it. In its recent draft report on embryonic stem cell research, the commission moves beyond philosophical deliberation to an assertion of regulatory authority. It declares that it "is charged with developing guidelines and regulations as they relate to bioethical issues arising from research on human biology and behavior (including the clinical applications of that research)." The draft adds that the

commission "has an opportunity to provide a broad public policy framework for research that can prospectively anticipate [sic] scientific developments."

But even if the NBAC does give a general go-ahead for embryonic stem cell research, the commission may not approve the creation of embryos specifically to generate stem cells. Instead, the NBAC apparently will recommend that research be conducted only using embryos created first for in vitro fertilization and later donated by couples after their infertility treatments have concluded. This restriction, should it be adopted, could slow progress in stem cell research since Geron Corp. is already trying to create human embryos as sources for stem cells. The Geron researchers are doing this by inserting the genetic material from mature human cells into enucleated human eggs. If this restriction were to remain in force, it would prevent the development of the most promising stem cell treatments—the growth of new tissues using embryonic stem cells created from a specific patient's own cells. Thus, Gunst's son would be prohibited from taking one of his skin cells, putting its nucleus into an enucleated human egg, and growing new heart tissue for a perfect transplant.

"Many bioethicists argue that we need to stop developing these new technologies and then talk about whether we should allow them to go forward," says UCLA's Gregory Stock. "They want technology to stop so that they can design the perfect system."

Even if the commission doesn't actually ban a technology, the mere fact that it could do so has a chilling effect on biotechnological research. Scientists and companies will feel that they must submit their projects to the judgment of the NBAC before investing time and money in promising new treatments.

The whole concept of the NBAC and the ELSI program is ill-conceived. The commission may say it wants to "prospectively anticipate" problems, and ELSI was designed to be "a program that would anticipate potential problems before they actually occurred and identify possible solutions to the problems." But a mind-set that involves constantly and anxiously scanning the horizon for problems greatly increases the chances that you will eventually find them, even when they don't really exist. Agencies like the NBAC and ELSI focus on the problems a new technology might present, tending to overlook potential benefits. "Because there is a desire to get diversity on these commissions, you will always have a significant representation of those who are opposed to the technology," says Stock. "So when you reach a consensus within a committee like the NBAC it will tend to be very biased towards being very cautious."

Says Annas, "The job of ethicists is not to facilitate people doing new things, but to raise difficult questions. We're not supposed to be cheerleaders for every new thing that comes down the pike." The central question for Annas is, "What's the downside?"

Furthermore, the institutional dynamic of such proto-regulatory commissions forces them to worry about the political troubles that they will face should they approve something that later goes wrong. The NBAC, like the Food and Drug Administration, has every incentive to say no or "go very slow" to any new technologies.

"Many bioethicists argue that we need to stop developing these new technologies and then talk about whether we should allow them to go forward," says Stock. "They want technology to stop so that they can design the perfect system."

NBAC Chairman Harold Shapiro hotly rejects the notion that his commission retards biotech research. "There is no evidence that the work of commissions like this slows down research," he says. "No one has ever demonstrated that research has been slowed down without merit. There are no examples of that."

Others differ. "They'd surely have to be slowing research down," says Engelhardt. "Think about how Hillary Clinton probably impacted negatively important pharmaceutical research when she was [pushing a national health care plan] at the beginning of President Clinton's term. She had the view that progress should be slowed in order to favor a cost containment....So you can easily imagine how any commission under those circumstances would generate morbidity and mortality costs for people because technology is not being developed in a timely fashion." In other words, fear of government intervention causes biotech companies to delay research and development, ultimately increasing both sickness and death.

Actually, the NBAC is not powerful enough for many bioethicists. Annas wants to "move beyond an advisory committee and establish a regulatory commission, a federal Human Experimentation Agency, with both rule-making and adjudicatory authority." Annas' proposed agency would promulgate rules and have authority to review and approve or disapprove of biotech and biomedical research proposals. The agency would regulate research and treatments involving xenografts, artificial organs, embryo research (including cloning), and genetic engineering. It would also "recommend legislation to Congress, including, for example, a ban on the sale of human embryos."

Annas concludes, "I would hope that it would slow things down."

The breakthrough in stem cell research was underwritten by the private Geron Corp., because the federal ban on experimenting with embryos doesn't extend to the activities of private companies. Annas' all-encompassing Human Experimentation Agency would close that loophole. Geron would be forced to submit its stem cell research proposal for approval. If such an HEA had existed, the usual caution of the bureaucrat doubtlessly would have slowed, if not stopped altogether, the development of stem cell technology.

Ethical anticipation in the face of rapid change is a recipe for stagnation. The smartest commission ever assembled simply does not have the creativity of millions of human beings trying to live the best lives they can with the help of new technologies.

The guiding star for the HEA would be an idea imported from radical environmentalism: the precautionary principle. (See "Precautionary Tale," April.) As Annas interprets the principle, those who propose major changes in the way that human beings live "would have the burden of proving that there is an important societal purpose for such an experiment before it is permitted." This principle shifts the burden of proof from critics and would-be regulators to innovators and researchers. Why does Annas want to make this shift? "Because the truth of the matter is that whoever has the burden of proof loses," he admits, "and so far the critics have always had the burden of proof, so they always lose."

But the creation of a central bioethics regulatory agency is too modest a goal for Daniel Callahan. "Can religion or bioethics or some other social group or force in our society call science to account when necessary?" asks Callahan. He notes that religion has lost much of its former cultural authority. In his view, bioethics could fill at least part of this vacuum. He envisions a bioethics that can say no to technological progress; a bioethics that transforms itself into a sort of intellectual counterculture standing in opposition to "scientific ideology." Science, asserts Callahan, "desperately needs to have a serious and ongoing challenger...a David against its Goliath." The discipline of bioethics, as he imagines it, would not just have power over treatment choices and research agendas; it would play a central role in defining the "good society."

"Good science cannot tell us how to organize good societies or develop good people (or even tell us how to define 'good') or tell us what is worth knowing," writes Callahan in the May 1996 issue of *Society*. Bioethicists, the new cultural clerics, would play that role, perhaps with inquisitional powers.

These are grandiose visions of cultural revolution. What we need instead is a return to the roots of bioethics: respect for patient autonomy as a central value. Such a modest bioethics would focus on helping patients and their families sort out the confusing choices before them in light of their own values. In fact, that's exactly what most working bioethicists do today: They work at hospitals, clinics, and research facilities talking with real people who need someone to help them make sense of the possibilities and perils that new medical technologies offer.

The moral work of bioethics should advance case by case, building a kind of common law morality in which bioethical principles arise from the accumulation of cases and evidence over time. As UCLA's Stock argues, "We should push forward while the technologies are young and mitigate problems as they arise."

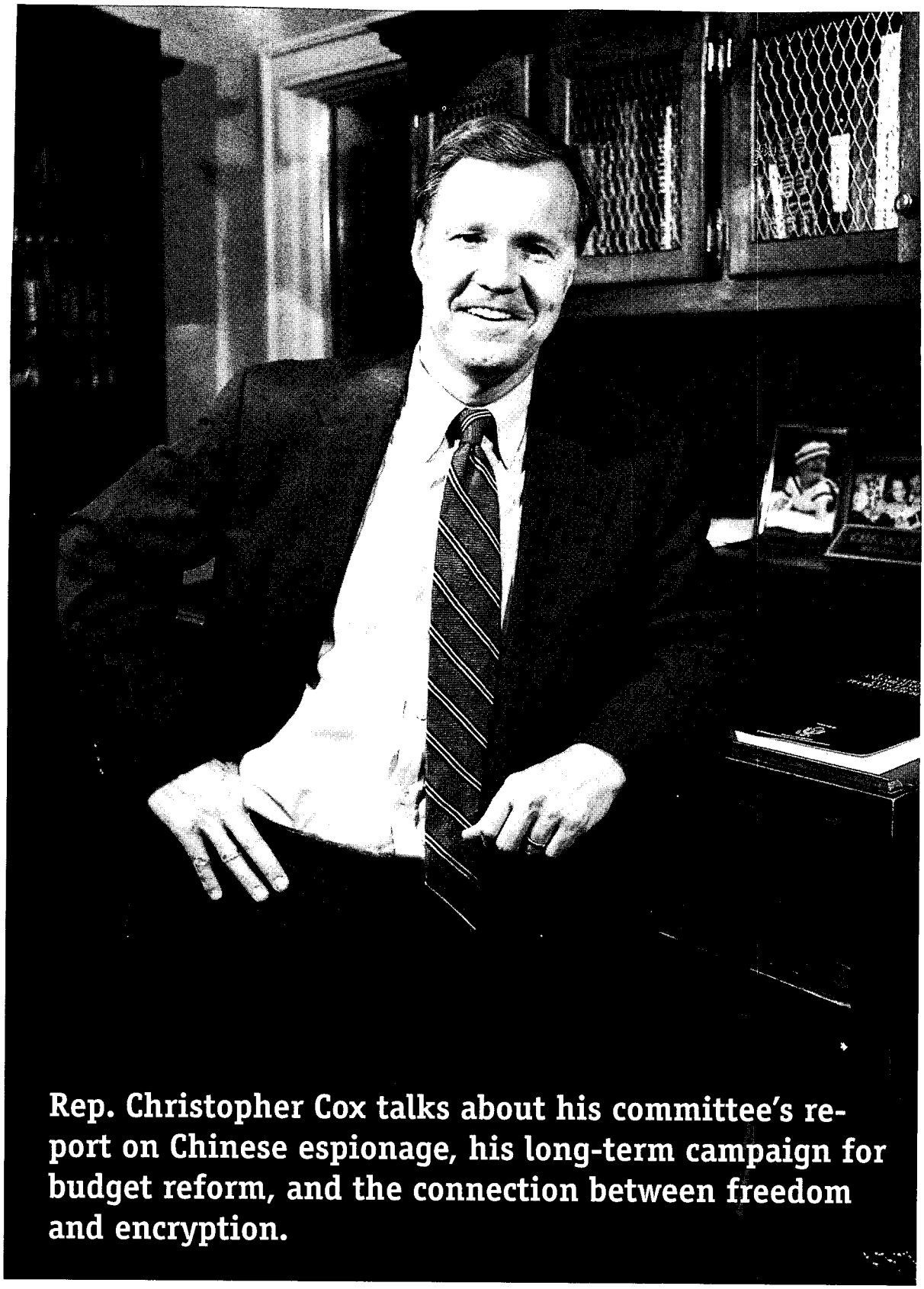
Ultimately, biotechnology is no different from any other technology: People must be allowed to experiment with it in order to find its best uses. Inevitably, people will make mistakes. They will sometimes perform acts with unfortunate ethical consequences. But we learn from our mistakes. Ethical anticipation in the face of rapid change is a recipe for stagnation (and as it happens, that is the real goal of many committed egalitarian bioethicists). It is also futile: The smartest commission ever assembled simply does not have the creativity of millions of human beings trying to live the best lives they can with the help of new technologies.

"One of the greatest hopes for average people throughout the world is biotechnological progress," says Engelhardt. "I think that those who speak against the hope of that kind of progress speak against the hopes of millions of sick and dying people."

Callahan admits that "part of the problem with a society addicted to scientific progress is that we can hypothesize harms but we simply can't make a very convincing case that the potential harms are enough to impose limits to a technology. People think that if we begin setting limits, soon there will be no way to stop the intrusion of limits on technological progress."

It turns out, to Callahan's dismay, that ordinary people like Joy Simha and Sidney Gunst are a lot warier of bioethicists than they are of biotechnology. ◆

Ronald Bailey (rbailey@reason.com) is REASON*'s science correspondent.*



Rep. Christopher Cox talks about his committee's report on Chinese espionage, his long-term campaign for budget reform, and the connection between freedom and encryption.

PHOTOS: CHAS GEER

COX REPORTS

Since coming to Congress in 1988, Rep. Christopher Cox (R-Calif.) has been a hard man to pigeonhole. When he talks about taxes, government bloat, and the defense of freedom, he sounds like the man he served as a White House counsel, Ronald Reagan. When talk shifts to the policy intricacies of the federal budget or tort reform, Cox's Harvard Law School and MBA background peek through. When he works on cyberspace issues—a moratorium on Internet taxes, a free speech alternative to the Communications Decency Act—he's the entrepreneur who went online in the mid-'80s. (That business translated *Pravda* into English, reflecting Cox's anti-communism and his interest in foreign relations.)

Nor has Cox limited himself to high-profile issues. In the early '90s he took up the cause of Lithuanian independence, traveling to Russia in 1991 to deliver a speech on freedom—in Russian. Cox's efforts helped focus world attention on the tiny Baltic state at a time when it was not at all clear if Moscow would accede to independence or roll tanks. In May 1998, Cox was presented with the Order of the Lithuanian Grand Duke Gediminas, the highest honor the Republic of Lithuania can give to a living noncitizen.

In the spring of 1998, then-Speaker Newt Gingrich was looking for someone to head a select committee investigation into technology transfers to the People's Republic of China. Given the campaign finance scandals of 1996, China was a hot topic, requiring some tact if the enterprise was to do anything except dissolve into partisan squabbling. Every other congressional investigation in the Clinton era had ended that way. The committee also needed someone capable of attending to details inside a very large picture. Few could have foreseen what the Cox panel would find.

In a few months the select committee found evidence of the theft of U.S. nuclear secrets by China stretching back decades. Further, it found that the Clinton administration's safeguards against the transfers of advanced military technology to China had been lax or nonexistent. Significantly, every Democrat on the panel signed on to the conclusions, and no minority report taking issue with the findings was generated.

Although the final report was given to the Clinton administration on January 3, the public got a look at the findings after months of delay—and once impeachment was safely in the national rearview mirror. The full report probably will never be released. Administration concerns about ex-

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Interviewed by Michael W. Lynch and Jeff A. Taylor

posing U.S. sources of intelligence are the official reason.

Following the release of a declassified version of the report, Cox found himself very much in demand to explain what his committee had found. It was a big boost in visibility for a member often described as "thoughtful" or "cerebral," peculiar Washington epithets referring to someone smarter than the reporters who cover him.

In the attention deficit world of the Beltway, the "Cox report" brought him back into the national spotlight. Only months earlier Cox had suffered a political setback when he had to quickly fold his bid to become speaker after it was clear he did not have the votes. He remains the chairman of the House Republican Policy Committee, a key leadership slot which helps shape the GOP agenda.

Cox sat down with Washington Editor Michael W. Lynch and *Reason Express* writer Jeff A. Taylor in early June, as he was busy passing an amendment to the Pentagon budget which requires the administration to report to Congress by November on the status of China's missile technology.

■ ■ ■

Reason: This report has been a model of bipartisanship. How did you achieve it?

Christopher Cox: There were two [factors]. The first is that the members were handpicked, on both the Democratic and Republican sides. They were selected for a serious commitment to hard work, their willingness to use discretion in sensitive areas, their expertise, and their sound judgment. Put another way, the variation about the mean that one normally sees among politicians was quite narrow here.

The second difference was the subject matter. It was much easier for us all to decide to be on the same team than if we were working on taxes or spending or the usual things that divide liberal from conservative, Republican from Democrat. The question before us was the extent to which United States national security was undermined by transfers to another country that, whatever one may think of it, certainly does not always have America's best interest foremost in mind. As a result, we all decided early on that we were not going to be on the Republican or Democratic team but the American team.

Reason: What caused the bipartisanship to break down after the report?

Cox: The reason that our report was unanimous was that we stuck to the facts. Because the facts spoke so loudly for themselves, there was no need to spin the report with inferences. But anyone reading the report will be led to his or her inferences very rapidly. Once the report was published, demands were made for the resignation of the attorney general, the national security adviser, and others. Apparently there will be significant firings in the Department of Energy. The Clinton administration is under fire—that has changed the political calculus.

Reason: Have you been happy with the way this report has been received by the media?

Cox: It has been received well throughout the country, including on television, and indeed it's received positive press throughout the world. The one pocket of negative press has been the *Los Angeles Times.* It looks a hell of a lot more like *The People's Daily.* One can read the *People's Daily* party line on the Internet. About a day before *The People's Daily* said our report was racist, the *Los Angeles Times* wrote an article saying this was breeding racism. It is an astonishing charge, inasmuch as I have been working for 11 years with the democracy movement in the People's Republic of China.

Reason: It seems that some Chinese Americans are taking the report as anti-Chinese or anti-Asian. Should Republicans be on guard for this type of thing?

Cox: Because you probably read the *Los Angeles Times,* that is a reasonable inference. That is an intentional manufacture, however, of the People's Republic of China, which has been pushing the line that to oppose Communist Party policies is to be racist. The [op-ed] piece I wrote with Wei Jingsheng in the *Los Angeles Times* addressed that directly. Wei Jingsheng founded the Democracy Wall Movement and is the most revered of China's dissidents. He has spent most of his life in prison and is still under exile.

What we said in that piece is that the people in the *laogoi* slave labor camps are Chinese, that the people who are victimized by the show trials are Chinese, that the people on the receiving end of the missiles deployed on the Taiwan Strait are Chinese. It is outrageous to think that if you are on the side of freedom for the Chinese people and opposed to communism that you are anything but pro-Chinese.

Reason: Your report has been criticized by a foreign policy analyst at the Cato Institute for exaggerating the threat Chinese espionage poses and therefore being a version of the age-old Washington practice: Hype a problem and propose a government solution. Why use the worst-case scenario?

Cox: I am always troubled when I find myself in disagreement with someone at Cato. If the object is to spend less on defense, we would be wise to make sure that we are not spending U.S. taxpayer dollars to arm our potential opponents. Our recommendations in here are quite modest. A great deal of our report is simply to have the scales fall from our eyes so we know what we are dealing with.

It is not a worst-case scenario. Some of the Democratic signers of the report claim a [particular] sentence represents a worst-case scenario. The sentence they refer to is the date on which in 2002 a new intercontinental ballistic missile will be fielded with a warhead featuring particular U.S. designs. It takes their remarks out of context to say that ["a worst-case scenario"] refers to other sections of the report.

What is included in the report is only what we know to a certainty. We don't know, for example, what the PRC has stolen, except those things that have virtually fallen into our lap. Our human intelligence inside the PRC is very scarce. By all accounts we know precious little what is going on inside the PLA, the Communist Party, and the various institutions of the state.

Not only is the report fair, but it is intended that people will make their own inferences about where to go from here and what to do. If Cato wants to go one direction and Brookings wants to go in another, that's entirely predictable. What I would object to is someone trying to win the argument by saying that these are not facts, because they are.

Reason: Another basic critique has come from Cato and other places. It says, "They haven't got that much and what they did get they can't use" and, "Keep in mind that we have 30,000 nuclear weapons, while they have a few hundred."

Cox: There are several arguments there. First, "they didn't get much." Start with our most sophisticated nuclear warhead, the W-88 that goes on the Trident D-5. They successfully tested their version of W-88. They got it right, and all we can say in an unclassified way is, [they did so] "virtually immediately." In the classified report, we say just how fast that was.

It took us decades and hundreds of nuclear tests. They have built and successfully tested that weapon. They have built and successfully tested the neutron bomb, the W-70 warhead. So if they can build and successfully test a weapon without doing the preliminary work, it means they stole the design.

Reason: Is it something they could not have possibly spent enough money to acquire any other way, given the state of their economy and defense budget?

Cox: It would have taken them many, many more years to accomplish. It isn't merely a matter of money—it requires time, unless you can steal the answers. And time for us is more important. We are not so much trying to get them to spend their money as we are trying to put off any advances they might make that threaten the regional security.

Reason: The Chinese made a great show recently of being able to get some warhead information off of public Web sites. How does that kind of information differ from what you believe they stole?

Cox: You can't build a nuclear weapon based on it. They successfully built and tested these weapons. Therefore you know that [publicly available information] is not what they got.

Reason: The White House spin, which was picked up by many news organizations, is that this espionage is a long-running problem dating back for at least three administrations. In your estimation, how much blame is borne by the Clinton administration?

Cox: Our report states that the magnitude of the problem was not known until 1995. As a result, the critical time period has been the last four years. Questions properly have been raised over whether the response has been adequate. I am outraged as chairman of this select committee that Congress was kept so much in the dark. Sitting to my left during our 34 hearings was the ranking Democrat on the Intelligence Committee; sitting to my right was the chairman of the Intelligence Committee. I guarantee you, because I saw the looks on their faces and heard the anger in their voices, that they

"I am always troubled when I find myself in disagreement with someone at Cato. If the object is to spend less on defense, we would be wise to make sure that we are not spending U.S. taxpayer dollars to arm our potential opponents."

"I was told that the sum total of time that the director of central intelligence briefed the president—not just on China but on the rest of the world—during his entire tenure was two hours. This is compared to President Reagan who had a briefing every morning."

had never heard these things before.

Reason: Why hadn't they? *National Journal* notes that "the sheer breadth of the security lapses, misguided policy shifts, and negligence by U.S. agencies just since 1992 strains the logic of the official explanation: that it was all the result of many separate and coincidental instances of bureaucratic incompetence." What accounts for the Clinton administration's failure to pay more attention to Chinese espionage and report it to you in Congress?

Cox: I asked Jim Woolsey, who was President Clinton's first CIA director, how interested President Clinton was in the problems of espionage by the PRC. How much time did the president take to learn these things? I was told that the sum total of time that the director of central intelligence briefed the president—not just on China but on the rest of the world—during his entire tenure was two hours. This is compared to President Reagan who had a briefing every morning.

Reason: President Clinton later on did seem very interested in China, particularly in making domestic connections with Chinese who helped fund his soft money presidential campaign. What role, if any, do you think these political connections played in his lack of interest in national security threats from China?

Cox: No one who watches television would think that President Clinton isn't concerned about gun control. Why then would he meet with Wang Jun, a notorious arms dealer whose company at that very time was under indictment for smuggling over 2,000 AK-47s into San Francisco?

Reason: When did he meet with him?

Cox: That was at one of those notorious coffees in 1996.

Reason: Why did the campaign-contribution connection fall out of the report?

Cox: It did not. We included all of the original material we were able to generate on those points. And specifically the dots that had heretofore been unconnected are now a bright red line leading directly from PLA military intelligence to the 1996 campaign.

Gen. Ji [Shengde], who is the head of the Military Intelligence Division of the People's Liberation Army, met with PLA Col. Liu [Chaoying] and [Democratic Party donor] Johnny Chung in Hong Kong. It was agreed that $300,000 would be wired to Chung three days later. That amount of money was wired from Col. Liu's account at Citibank to Chung's account in Hong Kong. On that same day, $300,000 was wired into Colonel Liu's Citibank account from CITIC [China International Trade and Investment Company, headed by Wang Jan and described in the Cox report as "the most powerful and visible corporate conglomerate in the PRC"] Industrial Bank. CITIC is described in rich detail in our report.

Beyond this, we included in our report, for the first time for the American public, information about the possible connection of Charlie Trie to bribery scandals involving the PRC government and satellites manufactured by Hughes for foreign launch in the PRC. We also attempted to include in the unclassified version of the report, but included much more in the classified version, information on [former Commerce Department official and Democratic Party fund-raiser] John Huang's access to classified information, which was extensive. And his maintenance of an office a few blocks away, unbeknown not only to his boss at Commerce but also to his secretary, where he had constant telephone and fax contact with the Lippo Group. And we described the Lippo Group's affiliation with China Resources, a known [Ministry of State Security] front.

We also had a number of witnesses who took the Fifth Amendment and/or fled the jurisdiction. A reason we did not expand further beyond what other House and Senate committees have done in the area is that we ran into the same brick walls in terms of cooperative witnesses.

Reason: A third of the report is still classified. According to some news reports, much of what's classified has to do with the later years. Were you happy with the negotiations with the Clinton administration over how to unclassify the document?

Cox: I am very concerned that some of the information that ought to be out for people to make policy judgments is not out. This is particularly true in the area of the very recent export of high-performance computers to particular end users in the People's Republic of China. But the deletions were

made in order to protect sources, and second-guessing the representations of the intelligence community on that score is a matter of life and death.

Reason: Has the public taken this problem seriously enough?

Cox: We have seen a sea change in the approach to national security matters involving the PRC. No one gave it a second thought a year ago. In fact, a year ago most Americans did not even know that during the 1990s for the first time the PLA deployed an entire force of CSS-4 intercontinental ballistic missiles that target the entire continental United States, from Los Angeles to New York and everything in between. I'm pleased with the progress we are making.

Reason: How do we need to adjust our strategic thinking?

Cox: There has been manifest change in the PRC's approach to geopolitics since 1991. The Communist Party has decided to fill the void left by the collapse of the Soviet Union. It has aligned itself with opponents of the United States around the globe. It is stitching together an alliance of misfits. It is engaging in extensive military cooperation with Russia.

One of the main objects of our China policy over the last several decades was to prevent military cooperation between the Soviet Union and the PRC. The Clinton administration's current China policy is producing as one of its most significant results military cooperation between the PRC and Russia. That cooperation, incidentally and importantly, is not in Russia's national interest. Almost no one in Russia thinks it's in Russia's national interest. But the reason it's happening is because massive hard currency reserves in PRC are being used to bribe individuals who are willing to sell the crown jewels of Russia's military.

Reason: The PRC comingles its commerce and defense in order to obtain classified information. You're a supporter of normalizing trade relations with China. Explain why.

Cox: I just mentioned that the hard currency surplus that the Communist Party can lay its hands on is a source of mischief. It's an attractive nuisance vis-à-vis Russia. It is used to purchase military equipment from Europe or Israel. The hard currency surplus is simply the other side of the equation from the trade deficit we hear so much about. If instead of them selling us four times more than we sell them, we were able to make some sales in China of couches, refrigerators, phones, and so on, then they would have a better merchandise balance and less of a hard currency surplus. That's in our national security interest.

I am not one—and I want to emphasize this—who thinks from an economic standpoint that there is any need to have balanced trade with every nation all around the planet. That's absurd. The trade deficit in and of itself is not threatening. In this particular case, one of the things it means in real life is that there's a hard currency surplus for the PRC.

Reason: So you see normalizing trade relations with them as a way for us to export them more real goods, and therefore less currency, and therefore serve our national security interests?

Cox: After all, they are selling us Beanie Babies. They are not selling us nuclear weapons. A mutual trade relationship would have us selling nonthreatening things as well.

Reason: In your mind, what's the difference between trying to stop the flow of encryption technology from the United States to other countries and halting the flow of other advanced technology?

Cox: First, nuclear warheads are not dual use, and encryption technology is. Second, with encryption technology, the question is, How realistic is the U.S. government's position? How realistic is it for us to think that there's a national security benefit in attempting to control the uncontrollable? It is uncontrollable at the level we are trying to control it. U.S. citizens need protection against spying by foreign governments, and encryption is one of the protections.

Reason: So the standard argument that we can't let out encryption technology because terrorists will get it doesn't, or at least shouldn't, enter into this debate.

Cox: I don't mean to suggest that there aren't arguments against encryption. But I spent half a year in classified hearings taking testimony under oath from officials from the National Security Agency, the CIA, the FBI—the entire intelligence community of the Clinton administration—and I left that experience being utterly unpersuaded of the Clinton administration's position on encryption [which prohibits exporting strong encryption software].

Lin Hai is a software designer in jail in the PRC now because he sent e-mail addresses from the PRC to an anti-communist group in the United States. The MSS [Ministry of State Security] would not have been reading his e-mail if he had had commercially available encryption technology. We have to keep our goal in mind. And our goal is getting rid of the communist state and instituting liberty. Not getting rid of one form of fascism and substituting another.

Reason: We are talking just a few days after the 10th anniversary of the Tiananmen Square massacre. Was the democracy movement in Beijing a historical blip?

"The Communist Party has decided to fill the void left by the collapse of the Soviet Union. It has aligned itself with opponents of the United States around the globe. It is stitching together an alliance of misfits. It is engaging in extensive military cooperation with Russia."

"The most populous country on earth in 2020 is India, not the PRC. As justification for his China policy, Richard Nixon said it is difficult to ignore a billion people. We are doing a fine job of ignoring a billion people in India today."

Cox: No. The desire for freedom in China is as strong as ever before. The 1989 effort almost succeeded. The fact that it failed in 1989, the fact that the leaders—over 1,000 of them—were executed does not mean that one-fifth of the world's population wishes to be held under the thumb of communism forever.

Reason: What do you think relations between the United States and China will look like in 2009?

Cox: I hope that we have a completely free exchange of people, ideas, and commerce between the United States of America and the Republic of China, no longer the People's Republic of China.

Reason: Some commentators think the early years of the next century will be marked by confrontation, perhaps even outright conflict among Asian powers, India, China, Pakistan. What is the U.S. strategic interest in the region?

Cox: I went to New Delhi and met with the president and prime minister of India two years ago, and Prime Minister Gujral told me that the PRC was exercising a pincer movement on India. He pointed specifically to the deployment of nuclear missiles in Tibet, to the submarines in the Indian Ocean—which we now know will soon have U.S.-designed nuclear warheads—and to the fact that Burma had been turned into a PLA armed camp and Pakistan was being armed by the PRC as an irritant to India.

We have a history of cordial relations with Pakistan. These days we have no reason to prefer India or Pakistan, and a lot of good reasons to help them resolve their dispute in Kashmir. If we devoted one ounce of the tons of energy that is being applied to our policy of engagement with the PRC to the largest democracy on Earth, I think the early gains would be impressive. Beating up on the PRC has not and probably will not work as a trade policy. But there's no reason in the world that we cannot be equally nice to India, China's rival.

That negotiating leverage will more than anything improve our relations with the PRC. At the same time, it offers us the prospect of opening up new markets in the most populous country on the earth. The most populous country on earth in 2020 is India, not the PRC. As justification for his China policy, Richard Nixon said it is difficult to ignore a billion people. We are doing a fine job of ignoring a billion people in India today.

Reason: One of the great transmitters of American ideals and principles is America's open media. Might it be a good idea to include in any trade deal we cut with China a provision that it allows in American media?

Cox: Rupert Murdoch won a concession from the PRC just a few years ago for Star TV to have satellite rights. But in turn, he had to agree that the PRC's propaganda ministry could exclude anything they found objectionable. It is not required by nature that all trade is liberating. It is possible that Star TV, even though it is only broadcasting approved information, is nonetheless a better foot in the door than nothing at all. But we should not think in some sort of politically Calvinistic way that positive results are foreordained just because somebody is making money.

Reason: Environmental and labor provisions are often included in trade negotiations. Is it legitimate for open access to media to be a part of them as well?

Cox: Of course. Right now, the PRC is building an intranet, so all of the Chinese citizens who think they are logging onto the Internet are really logging onto an environment in which all foreign news, and even financial news, will be excluded. It requires a great deal of advanced technology to pull off something so audacious. Undoubtedly the PRC will be able to buy it.

Reason: That seems to be the backdrop of what we are talking about—the movement of technology and information across borders. Repressive regimes like China's seem to want to cherry-pick technology for the state while keeping information from the public. Is there anything that U.S. policy can do to change that?

Cox: Some of the things are so obvious that they are often overlooked. The president of the United States made a 10-day trip to the PRC. He refused to meet with the founders of the Chinese Democratic Party while he was there. At the same time, he pointedly called Jiang Zemin "the right leader at the right time." The message was not lost on the Communist Party. They rounded up the leaders of the Democratic Party, who attempted to register within the rules, and put them in jail, where they still remain.

Reason: In an op-ed, you write, "The exercise of joining the democracies together behind an international export-control regime, like the annual human rights resolution in the U.N. Commission on Human Rights, is important." Could you expand on that?

Cox: We have the worst of all possible worlds when it comes to U.S. export control. There is paperwork. There are denials of licenses. As a result, there are administrative overhead expenses and lost market opportunities. Competitors in allied countries eat our lunch. When the U.S. government denies a sale, U.S. citizens have a right to expect that it will be for some overriding national security benefit.

If the United States government doesn't lift a finger to win the cooperation of our allies in such an effort, then it is twice shame on us. Until

1994, there was such a regime [the Coordinating Committee for Multinational Export Controls (COCOM), which restricted exports to communist countries]. The Clinton administration led the way in dissolving it. Undoubtedly, COCOM should have been updated after the collapse of the Soviet Empire. But COCOM covered not only the Soviet Union and the Warsaw Pact but also the PRC.

Reason: Sort of like Humpty Dumpty—it's broken and you want to put it back together again.

Cox: My view is that it wouldn't be hard to put it back together. It would require only that the president desired it. We could begin by talking to our closest allies—England, Canada, Mexico—and asking whether they would commit to a multilateral regime, provided the United States was successful in winning two or three dozen commitments first. Pending approval by such a large number of countries, I believe many of our allies would say yes.

Reason: Let's go to domestic issues. It's budget time again, and it looks like there will be another omnibus bill. I was recently talking with someone who works domestic policy at the White House who says they are putting together a wish list of all the items they expect to get in last-minute negotiations. He said, "I don't know why [Republicans] do this to themselves every year." Why do you?

Cox: Actually we are going to pass all the appropriations bills before we recess this summer.

Reason: You say that with a straight face.

Cox: We have had two conferences two days in a row devoted to this very topic, and we are committed to doing it before we leave in August.

Reason: You have been working on budget process reform for years. Briefly, what would your budget process reform bill do?

Cox: The law on the books since 1974 requires that we finish by June 30. Congress, Republican or Democrat, has never done that. If we were to enact my legislation, the failure to obey that law would have serious consequences. First and foremost, the Congress would lose the capacity to do what they call "improvement" on last year. Everything would be frozen at last year's levels. Second, it would take two-thirds to go outside the budget. Third, the president would be given redundant opportunity to exercise a power called line-item reduction. Not just to line something out, but to pare it back to a level originally set in a budget.

Reason: It seems like a good idea. You have a lot of co-sponsors. Why does it have such a hard time going anywhere?

Cox: Fiscally conservative majorities in the House and the Senate are insufficient. That's the politest way I can put it.

Reason: From the outside looking in, there seem to be few voices for limited government in Congress. Why was the political momentum for limiting government dissipated? How can it be regained?

Cox: It has not dissipated. We have to remember historically where we are coming from. Because of the narrow margins in the House of Representatives—which may have more to do with Monica Lewinsky and impeachment than with a national desire for profligate spending—the realm of the possible is more tightly circumscribed. Being in the majority requires that you spend an awful lot of time in the realm of the possible. The majority is responsible for passing the bills that are necessary to keep the doors open. And if the president sits at the other end of Pennsylvania Avenue and controls two-thirds of the votes with his veto, that is not always a happy chore.

When Republicans were in the minority, we were always operating in the realm of the impossible anyway, so we were free to spend most of our time on bills that described the world as we would like to see it. There is a little less of that intellectual R&D going on, because of the press of business. One hopes that a presidential election provides an opportunity to write on nearly a blank slate and that the vision will be more clear.

Reason: The Republican Congress made big gains in its first years, particularly in its ending of welfare as an entitlement. Since then, there seems to have been a lot of stumbling. What do Republicans do to make themselves attractive to voters when running against Democrats who are for welfare reform, seen as fiscally responsible, and tough on crime?

Cox: We need to expand the circulation of REASON magazine and diminish the circulation of the *Los Angeles Times*. I better go vote. ◆

"With encryption technology, the question is, How realistic is the U.S. government's position? How realistic is it for us to think that there's a national security benefit in attempting to control the uncontrollable?"

PRISON CONVERSION

After studying nonviolent drug offenders, a criminologist who once said "Let 'Em Rot" now says "Let 'Em Go."

Denese Calixte, an illiterate Haitian immigrant, managed to support her seven children by picking fruit in Florida for about $60 a day. In 1994, she fell from a ladder and injured her neck. Unable to work, she was desperate for money when a neighborhood crack dealer offered her $200 to keep his supply in her house at night. Early one morning, the police broke into her house and found 69 grams of crack. Convicted of possession with intent to deliver, Calixte was sentenced to 10 years in federal prison.

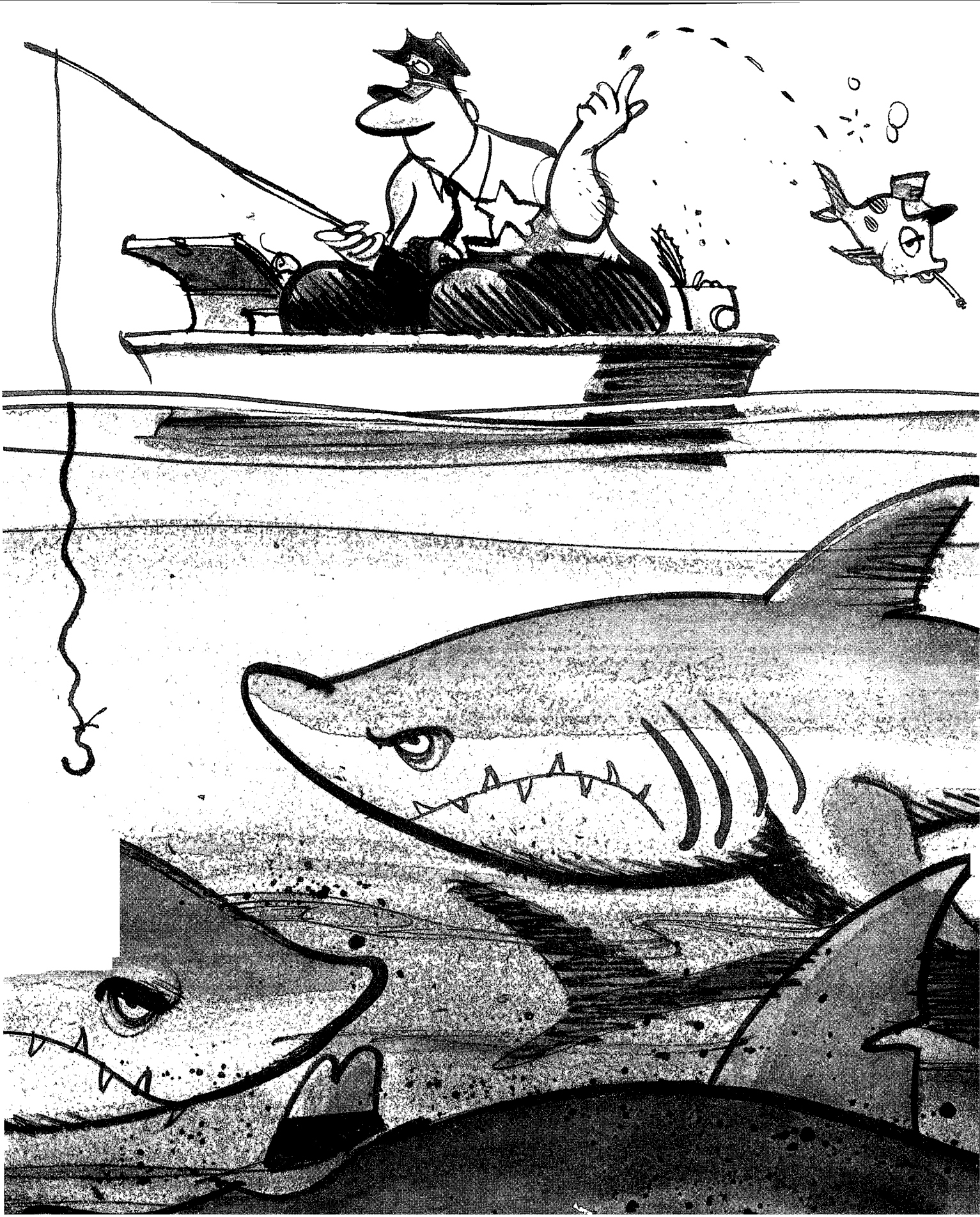
Loren Pogue, a real estate agent from Missouri, does not fit the stereotype of a drug trafficker. The father of 27 children, 15 of them adopted, and the cofounder of a home for orphans, he is an Air Force veteran, a Shriner, and a member of the Lions Club, the VFW, and the American Legion. Until 1990, Pogue's only trouble with the law was a 14-month sentence for tax evasion in the 1970s. But then he helped a part-time employee sell a plot of land in Costa Rica, where Pogue had moved with his family. As it turned out, the employee was a paid government informant, the buyers were federal agents pretending to be drug dealers, and the sale was a trap. Because the agents had talked about using the land as an airstrip to fly cocaine into the United States (even though the site was not suitable for that purpose), Pogue was charged with conspiracy to import drugs and money laundering. He is serving a 22-year sentence.

Despite a heroin habit that began in high school, Brenda Pearson was leading a stable, productive life. Married for two decades, she had two children and a job at a New York securities firm. She had never sold drugs or stolen anything to support her habit. In 1994, a close friend of Pearson's who was also a heroin user moved from New York to Michigan. She asked Pearson to mail heroin to her because she was having trouble finding a satisfactory supply. Over the course of a year, Pearson sent her friend about 40 packages, each containing less than 1.5 grams of heroin in single-dose bags that she had purchased on the street. When Pearson was caught, New York and federal prosecutors were not interested in the case, since she was simply sharing heroin with a friend. But a Michigan prosecutor had Pearson extradited and charged her with heroin distribution. She plead guilty to 10 counts and received 10 consecutive sentences of five to 20 years each. She will not be eligible for parole until she serves her 50-year minimum.

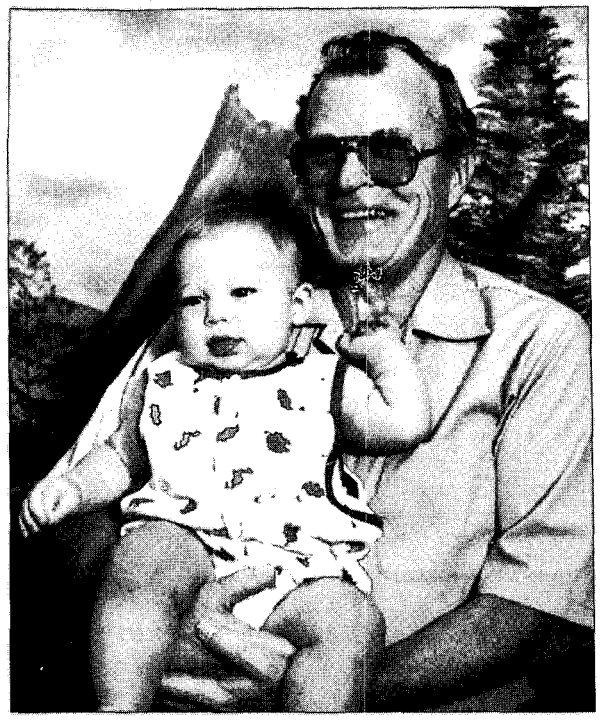
In 1991, David Ciglar, an Oakland, California, firefighter and paramedic credited with saving more than 100 lives, was training for a new career as an MRI technician, having been disabled by an injury during a rescue. Acting on a tip, agents of the Drug Enforcement Administration found 167 marijuana seedlings in his garage. To prevent prosecutors from charging his wife, which would have sent her to prison and their three children to a foster home, Ciglar pleaded guilty to marijuana cultivation. Because he had a prior conviction for cocaine possession and the DEA found an antique gun replica in his

BY JACOB SULLUM

HENRY PAYNE



ELECTRONIC REPRODUCTION PROHIBITED



Denese Calixte and Loren Pogue: They aren't violent, have no histories of predatory crime, and have lots of children—seven and 27, respectively—to support. One was sentenced to 10 years in prison, the other to 22.

house, Ciglar received a 10-year sentence. The government also confiscated the family's home.

These cases, described in the newsletter of Families Against Mandatory Minimums and in the book *Shattered Lives: Portraits From America's Drug War* (www.hr95.org), are supposed to make you shake your head. Even people who support the crusade for a drug-free America can see that something is wrong with separating decent, productive individuals from their families and making them serve hard time with violent felons. But while opponents of prohibition tend to see such cases as typical, representing the inherent injustice of the war on drugs, supporters see them as aberrations. According to this view, despite occasional instances of excessive punishment, drug offenders generally deserve the treatment they get: Not only do they contribute to a host of social problems by peddling addictive drugs, they also commit crimes against people and property. In other words, they would belong in prison even if there were no drug laws to break.

Assuming that involvement with illegal substances is a marker for anti-social behavior, the drug laws may very well make it easier to incapacitate predatory criminals. But so might a policy that allowed police to round up young black men, guys with tattoos, or simply people they thought looked suspicious. The fact that such discrimination might help prevent crime does not make it fair or reasonable. Nevertheless, it is much easier to support the status quo if you believe that people imprisoned for drug offenses are, with few exceptions, dangerous thugs. Conversely, if you believe that many drug offenders are people like Denese Calixte, Loren Pogue, Brenda Pearson, and David Ciglar —people who do not represent a threat to others—the argument for keeping them all locked up is far less compelling.

Until recently, it was impossible to say with much confidence which view was closer to the truth. But during the last five years or so, evidence from various sources has indicated that a sizable percentage of convicted drug offenders, and perhaps a majority of those now being sentenced in some jurisdictions, are not predatory criminals. These "drug-only offenders," as researchers have dubbed them, represent a substantial and growing share of the total prison population, largely because of state and federal laws that impose mandatory minimum sentences without parole for certain drug crimes. The troubling implications of this trend for both justice and public safety have made sentencing reform a cause embraced by hard-headed conservatives as well as soft-hearted liberals.

John J. DiIulio Jr., a criminologist who has little patience with what he calls "the soft-in-the-head anti-incarceration left," is emblematic of this shift. DiIulio was initially skeptical of the notion that the drug laws imprison large numbers of people who are not menaces to society. But he recently completed research that provides some of the strongest evidence yet for this claim. Though he still supports prohibition—not surprising for a political scientist who trained with a prominent defender of the

drug laws, James Q. Wilson, and co-authored a book on crime with former drug czar William Bennett—DiIulio has become an outspoken critic of current sentencing policy. "Basically, what you're getting from me is coerced by the latest data," he says. "It seems to me that with respect to these drug offenders, the mandatory minimums have begun to go haywire."

A 41-year-old Harvard Ph.D., DiIulio is a former professor of politics and public policy at Princeton and former director of the Brookings Institution's Center for Public Management. He is now a senior fellow of the Manhattan Institute and the Fox Leadership Professor of Politics, Religion, and Civil Society at the University of Pennsylvania. An expert on prison management who published influential books on that subject in 1987 and 1991, he later turned his attention to the cost-effectiveness of incarceration. Based on surveys of prisoners, he concluded that it costs less to keep the average predatory criminal locked up than it does to let him go, given the crimes he would commit if he were free. Publishing articles with titles like "The Value of Prisons," "Prisons Are a Bargain, by Any Measure," and "Let 'Em Rot," DiIulio was often cited by conservatives advocating more prisons and longer sentences. "No one—at least, no one in elite policy-wonk circles—is a bigger fan of incarcerating known, adjudicated adult and juvenile criminals than me," he wrote in a 1996 article for *Slate*.

But DiIulio's argument for the cost-effectiveness of prisons hinged on the ability of the criminal justice system to distinguish between offenders who would prey on their fellow citizens if released and offenders who would not pose a threat to others. Locking up people in the latter category would not only waste money; it would waste prison space that could otherwise have been used to incapacitate predatory criminals. Given this consideration, the question of how to deal with drug offenders was bound to come up.

DiIulio took an early crack at the issue of whether prison is cost-effective in a 1991 article for *The Brookings Review* co-authored by Anne Morrison Piehl, then a Princeton doctoral candidate and now an economist at Harvard's John F. Kennedy School of Government. There DiIulio and Piehl simply excluded drug crimes from their calculations, following the standard practice of other researchers in this area. "This is not the place to referee the drug debate," they wrote.

In a *Wall Street Journal* op-ed published the next year, DiIulio downplayed the distinction between drug offenders and predatory criminals. "About 90 percent of prisoners are serious (two or more felony convictions) or violent offenders," he wrote, citing what became one of his favorite statistics. That figure, based on a 1991 survey of state prisoners by the Bureau of Justice Statistics, puts people arrested twice for drug offenses (such as David Ciglar, the California firefighter) in the same category as serial bank robbers, rapists, and murderers. In the opening paragraph of the *Journal* article, DiIulio referred in one breath to "criminals who assault, rape, rob, murder and deal drugs."

When DiIulio directly addressed the treatment of drug offenders in a 1993 book review for *The New Republic*, he implied that they were getting off too lightly. "It is not unreasonable to argue," he wrote, "that the problem with the 'get-tough' approach of the last twenty-five years is that it hasn't actually been followed. Despite mandatory sentencing laws, most drug offenders and other felons continue to spend only a fraction of their sentences behind bars."

As part of a "radical experiment" in "the serious enforcement of existing laws," DiIulio said, "prosecutors and judges would need to tighten the screws on drug-law violators who are used to copping pleas to lesser charges and spending little or no time locked up." Denying that "the war on drugs has placed tens of thousands of petty first-time drug-law violators behind bars," he said "the vast majority of 'drug' criminals behind bars were convicted of sale or manufacture, not simple possession, and had prior criminal records. Many of them would be and should be incarcerated even if the antidrug laws did not exist."

Criminologist John DiIulio is emblematic of the shift. Though he still supports prohibition, he has become an outspoken critic of current sentencing policy. "What you're getting from me is coerced by the latest data," he says.

Meanwhile, an increasing number of researchers and judges were concluding that the sentencing policies set by Congress in the 1980s, at the height of the Reagan-Bush drug war fever, were senselessly rigid and excessively harsh. Supposedly aimed at "drug kingpins," the mandatory minimum sentences that Congress began to enact in 1986—which were tied to drug weight, without regard to the extent of the defendant's culpability or the level of his involvement—mainly affected small-time operators and flunkies. According to a 1994 report from the Federal Judicial Center, less than 15 percent of the defendants convicted under mandatory minimum statutes in fiscal year 1992 were drug trafficking managers or supervisors. Not surprisingly, the report concluded that "mandatory minimums have had no observable effect" on crime or drug availability.

Also in 1994, a report from the U.S. Department of Justice concluded that "a substantial number of drug law violators who are sentenced to incarceration in Bureau of Prisons custody can be classified as 'low-level.' " Under one set of criteria used in the report—no record of violence, no involvement in sophisticated criminal activity, and no prior imprisonment—there were 16,316

such prisoners in June 1993, representing 36 percent of drug offenders and 21 percent of all federal inmates. Even when the DOJ restricted the category to prisoners with no prior arrests in their records, there were 9,673 low-level offenders, 21 percent of the people serving time for drug crimes. Average sentences were nearly seven years for the first group, more than five years for the second. The report noted that sentences for drug offenders with minimal or no criminal histories had more than doubled since 1985. "The relative harm of drug trafficking," it said, "has been elevated above that of almost every serious crime other than murder."

By the early 1990s, federal district court judges such as Jose Cabranes in Connecticut, Stanley Sporkin in the District of Columbia, and Jack B. Weinstein in New York were openly criticizing the laws that forced them to give sentences they considered unjust. They were joined by appellate judges and Supreme Court justices. Testifying before Congress in 1994, Justice Anthony Kennedy said, "I think I'm in agreement with most judges in the federal system that mandatory minimums are an imprudent, unwise, and often unjust mechanism for sentencing." In a 1996 survey by the Federal Judicial Center, four-fifths of district and circuit court judges said the guidelines written by the U.S. Sentencing Commission should not be linked to the penalties set by Congress, an approach that has made sentences longer even for offenders not covered by the statutory minimums.

The federal experience with mandatory minimums was mirrored at the state level, where sentences could be even more onerous. Michigan had its notorious "650 lifer" law, under which 650 grams of cocaine or heroin, less than a pound and a half, triggered a life sentence without parole. But the real leader in mandatory minimums was New York, which had been punishing drug offenders with unusual severity since 1973. That was the year that Gov. Nelson Rockefeller pushed the state legislature to pass two laws, the first establishing mandatory minimums for drug offenses, the second raising sentences for repeat offenders.

These laws have been modified over the years, mainly to reduce penalties for marijuana offenses, but they remain exceptionally harsh. A first-time offender convicted of selling two ounces or possessing four ounces of heroin or cocaine receives a mandatory sentence of 15 years to life—the same as the penalty for murder. Possessing as little as half a gram of pure cocaine or heroin triggers a minimum sentence of a year. If it's a second offense, the sentence is doubled.

A 1997 report from Human Rights Watch noted that drug offenders represented more than a third of New York's prison population, up from less than a tenth in 1980. This group was not limited to predatory criminals: Forty-four percent had never been incarcerated before, and 17 percent had no prior arrests. Even the repeat offenders did not look so dangerous upon closer examination: Among the drug offenders sentenced as second-time felons in 1995, 55 percent had been convicted of another drug crime the first time around; only 20 percent had been convicted of a violent felony.

Like federal mandatory minimums, the Rockefeller drug laws come down hard on people who are not exactly kingpins. In a 1993 case, an appeals court reviewed the sentence of Jesus Portilla, an asbestos remover with a wife and small child. A first-time offender, he had received a sentence of eight and a third to 25 years for a $30 cocaine sale. In 1997, Gov. George Pataki granted clemency to Angela Thompson, a first-time offender who had served eight years of her 15-year sentence. When she was 17, she had done the bidding of her uncle and legal guardian by trying to sell cocaine to an undercover cop.

As with the federal sentences, judges were among the first to recognize the injustices created by the Rockefeller drug laws. In a 1976 dissent, three judges on the New York Court of Appeals, the state's highest court, called a sentence of 15 years to life for heroin possession "unconscionable and barbaric." State trial judges publicly expressed their anguish at being forced to impose palpably unfair punishments. By 1995, George Pataki, another ambitious Republican at least as anxious to maintain a tough-on-crime image as Nelson Rockefeller, was conceding that harsh penalties for drug offenders "have filled New York's prisons and have not increased public safety."

Surprisingly, critics of the Rockefeller drug laws also included John DiIulio, who called for their abolition at an October 1995 governor's forum in Albany. His decision to oppose mandatory minimums came around the same time as a shift in his rhetoric regarding drug offenders. Five months before, at a conference in Berkeley, he had observed that "some small but as yet undetermined fraction of imprisoned state and federal drug law violators are neither major drug traffickers nor persons who have committed lots of serious non-drug felonies. At present, it is impossible to know how many low-level 'drug-only' offenders—first-time or repeat criminals whose only crimes, or most serious crimes, have been low-level drug crimes or mere possession—are behind bars in America today. One recent survey of state prisoners suggests that the figure could be as high as 15 percent."

DiIulio was referring to a 1993 study that he and Anne Mor-

At the state level, sentences could be even more onerous. Under Michigan's notorious "650 lifer" law, 650 grams of cocaine or heroin —less than a pound and a half—triggered a life sentence without parole. In New York, a third of prisoners are in for drug offenses.

Brenda Pearson (left) and David Ciglar: Few would deny that what happened to these people is wrong. But while opponents of prohibition tend to see such cases as typical, supporters usually claim they're aberrations.

rison Piehl had conducted in New Jersey, where 30 percent of the respondents reported that drug offenses were the only crimes they had committed in the four months before they were locked up. "If even half of the inmates who report that their only crime was selling drugs are telling the truth," they wrote in the Winter 1995 *Brookings Review*, "then 15 percent of New Jersey's spending on prisons is being devoted to 'sending a message' about drug dealing." In the New Jersey study, DiIulio says, "you start to get a hint of this drug-only population being a not huge but nonetheless significant part of the mix."

DiIulio and Piehl emphasized that drug dealers are easily replaced, so "the best estimate of the incapacitation effect (number of drug sales prevented by incarcerating a drug dealer) is zero." DiIulio says this conclusion was strongly influenced by the views of his mentor, Wilson, who had written in *Commentary* the previous year that prison terms for crack dealers "do not have the same incapacitative effect as sentences for robbery....A drug dealer sent away is replaced by a new one because an opportunity has opened up." While cautioning that "we do not yet have a definitive estimate of the fraction of the prison population that consists of drug-only offenders," DiIulio and Piehl suggested that locking up such offenders was a waste of money.

DiIulio continued this theme in a 1996 *New York Times* op-ed. "Prison definitely pays," he wrote, "but there's one class of criminal that is an arguable exception: low-level, first-time drug offenders....Though the numbers of petty drug offenders may prove small, it makes no sense to lock away even one drug offender whose case could be adjudicated in special drug courts and handled less expensively through intensively supervised probation featuring no-nonsense drug treatment and community service." He repeated his call for repealing the Rockefeller drug laws, describing their abolition as part of the effort "to keep violent and repeat criminals where they can't harm the rest of us."

Two months later, however, DiIulio was again emphasizing that drug offenders are dangerous characters who belong in prison. "Almost all imprisoned drug traffickers, federal and state, have long criminal records, adult and juvenile," he wrote in "No Angels Fill Those Cells," a *Washington Post* op-ed. "Only their latest or most serious adult conviction is for a drug offense. There are exceptional cases of truly first-time, non-violent, low-level drug offenders who end up behind bars. But they are the exceptions that prove the rule....Rather than accepting the usual bogus generalizations about drug offenders or non-violent offenders behind bars, demand to know...the totality of the adult and juvenile crimes committed by imprisoned felons against life, liberty, or property...In the end, the truth about prisoners' complete criminal histories will prevail—and the truth will set very few prisoners free."

That conclusion was based largely on a study for the Wisconsin Policy Research Institute that DiIulio and WPRI analyst George A. Mitchell had just completed. In a sample of 170 inmates from Milwaukee County, they found that 12, or 7 percent, had been sentenced for drug offenses. Within this group, 75 percent had a record of violence. Of the remaining three, one had been convicted of various property crimes, including burglary and auto theft. So just 17 percent of the drug offenders, and less than 3 percent of the total prison sample, were guilty only of drug crimes.

DiIulio concedes that the drug offender subgroup was "a teeny, teeny sample"; the study was not designed to get at the issue of drug-only offenders. Still, "it gave me a little bit of pause," reinforcing his initial inclination to believe that drug-only offenders are a rare breed. He reiterated that impression at a talk he gave at the Lindesmith Center, a Manhattan-based drug policy think tank, a few days before his essay appeared in the *Post.* But he said he was undertaking a study of New York prisoners in which he planned to look at a larger sample.

While DiIulio was working on that project, evidence from Massachusetts suggested that drug-only offenders are not so unusual after all. A 1997 study by Piehl, DiIulio's collaborator on the New Jersey survey, found that two-thirds of the state's recently incarcerated drug offenders had never been convicted of a violent crime. Data obtained by *The Boston Globe* from the Massachusetts Department of Corrections in 1998 showed that 84 percent of prisoners serving mandatory sentences for drug crimes were first-time offenders in the state.

From late 1996 through September 1997, DiIulio, Piehl, and University of New Mexico sociologist Bert Useem surveyed about 1,500 incoming prisoners in New York, Arizona, and New Mexico. They used anonymous questionnaires to ask the prisoners detailed questions about their backgrounds and criminal histories. They were not able to obtain access to the prisoners' records for confirmation, but research by the RAND Corporation in the 1970s had shown a good correspondence between inmates' self-reports and their rap sheets, once the data were adjusted to exclude apparent fakers (those claiming to have committed thousands of crimes in a year, for example).

of the people who are now being sentenced to prison under mandatory minimum and kindred laws as drug offenders," he says, "even though [sentencing reform] isn't going to free up a gazillion beds, it's going to free up a certain amount of space, it's going to relieve a certain amount of drain on the public purse, and it's going to make the system more effective at delivering public safety for the marginal tax dollar."

DiIulio laid out this argument in a March 12, 1999, op-ed for *The Wall Street Journal.* "Current laws put too many nonviolent drug offenders in prison," he declared, citing highlights from the three-state study, which was published in early summer by the Manhattan Institute. Among other things, he recommended abolition of mandatory minimums, reform of the federal sentencing guidelines, release of nonviolent drug offenders, and an end to the federalization of crime policy. "Such changes would undoubtedly reduce the number of drug-only offenders in federal prisons by tens of thousands," he wrote.

DiIulio followed that up with a May 17 *National Review* article making "a conservative crime-control case" for repealing mandatory minimums. "To continue to imprison drug-only offenders mandatorily," he wrote, "is to hamstring further a justice system that controls crime in a daily war of inches, not miles, and that has among its main beneficiaries low-income urban dwellers." He explains: "I view the criminal justice system as a sorting machine....For me, it's about one thing, essentially: How do you improve at the margin the system's capacity to sort in ways that increase public safety?"

DiIulio says "a number of people were surprised by my *National Review* article. 'Surprised' is one way to put it....Another way to put it would be, 'He's been running around in the streets too much, and he finally got hit on the head.'" The critics included his father, a former Philadelphia sheriff's deputy whose reaction DiIulio describes this way: "Spend enough time in these academic places, eventually you'll turn stupid."

In New York, most incoming drug offenders were not predatory criminals. "There is a large chunk of genuinely drug-only offenders," sociologist Bert Useem says. The percentage "was strikingly high to me—and worrisome."

DiIulio and his collaborators found that drug-only offenders accounted for 28 percent of incoming male prisoners in New York, 18 percent in Arizona, and 15 percent in New Mexico. Among female prisoners, the figures were 49 percent, 20 percent, and 14 percent, respectively. In New York, drug offenders represented 47 percent of new prisoners in 1997, so DiIulio et al.'s findings indicate that most of them were not predatory criminals. "There is a large chunk of genuinely drug-only offenders," Useem says. "That was a surprise to me, and I think to John." He says the percentage of prisoners in this category "was strikingly high to me—and worrisome."

These results had a dramatic impact on DiIulio's public posture vis-à-vis drug offenders.

"If it turns out that we have reached the point of diminishing returns with respect to somewhere between a third and half

The evolution of DiIulio's position partly reflects better-focused research with larger samples. It also reflects a changing reality. The number of people incarcerated for drug offenses has been increasing since 1980, in both absolute terms and as a share of the total prison population. The 1991 Bureau of Justice Statistics survey of state prisoners found that 21 percent were drug offenders, compared to 6 percent in 1979. Judging from DiIulio et al.'s figures for recently incarcerated prisoners, that percentage has increased since then. In 1994, 61 percent of federal prisoners were drug offenders, up from 25 percent in 1980.

The proportion of local jail inmates who are drug offenders rose from 9 percent in 1983 to 23 percent in 1989 and now appears to have leveled off.

Last year there were 1.8 million people behind bars in the United States, compared to some 500,000 in 1980. About one in four—more than 400,000—were there for drug law violations, compared to about one in 10, or 50,000, in 1980. As more and more drug offenders have been imprisoned, it is likely that the percentage who are not predatory criminals has risen.

DiIulio says he has seen anecdotal evidence of such a trend: "I've had prison wardens whom I've known for years say, 'I'm getting guys in now who, when I review their sheets, I can't believe they're here.'" The wardens acknowledge that there always were a few such prisoners, he says, "but when the outlier becomes the central tendency, it's time to re-examine policy."

John DiIulio: "I've had prison wardens whom I've known for years say, 'I'm getting guys in now who, when I review their sheets, I can't believe they're here.'"

DiIulio says another important influence has been Ethan Nadelmann, a close friend from graduate school who directs the Lindesmith Center and is a leading advocate of drug policy reform. "He's a constant pain in the ass," DiIulio says with a chuckle. "He was constantly saying, 'John, you're a reactionary prohibitionist.'"

For his part, Nadelmann says, "I used to feel that I would win John over two or three days a week, and Wilson would win him over the rest of the time. The problem was that he would do his writing on the Wilson days." But he adds, "If you look closely at John's writings, you can detect that he's never been a vigorous drug warrior, someone who believed that there was an inherent immorality to drug use that merited a draconian government response."

Some observers speculate that religion also had something to do with DiIulio's change of heart regarding drug offenders. A self-described "born-again Catholic," DiIulio has in recent years emphasized the importance of "the faith factor" in preventing crime and dealing with drug addiction. "I think it's been both a personal, spiritual revolution for him and an analytical change," says Julie Stewart, president of Families Against Mandatory Minimums (FAMM). "He's become softer and more forgiving as a result of his religious experience. But he also backs it up with data."

DiIulio discounts the spiritual take on his policy conversion. "I get a lot of that lately on a number of fronts," he says. "The religion thing, I think, might explain a little bit of the compassion." But he notes that his views on drug offenders began changing "when I was still just a good old-fashioned heathen." Stewart concedes that DiIulio has been criticizing mandatory minimums for several years, "but I guess I didn't really hear him until now. We're thrilled....I look at him as an ally."

Even with scholars like DiIulio advocating the repeal of mandatory minimums, the prospects for fundamental reform are iffy. Progress so far has come in small pieces. The U.S. Sentencing Commission, for instance, has changed the way that LSD and marijuana weights are calculated under the guidelines, leaving out part of the carrier (usually paper) for LSD and making the presumed yield per marijuana plant more realistic. Because these changes do not affect the way drugs are weighed under the mandatory minimum statute, the upshot is sentencing "cliffs": If a first-time offender is caught with 99 marijuana plants, he is subject to Sentencing Commission guidelines; each plant counts as 100 grams of marijuana, corresponding to a sentence range of 15 to 21 months. If he has one more plant, however, he is subject to the congressional weight standards; each plant counts as a kilogram, triggering a mandatory sentence of five years.

A "safety valve" provision approved by Congress as part of the 1994 Omnibus Crime Bill allows judges to sentence certain nonviolent drug offenders under the guidelines instead of the statutory minimums. The safety valve applies to people with minimal or no criminal histories whose offenses did not involve violence, weapons, or injury; who are not considered major players in the drug trade; and who cooperated with the authorities. In 1997, this provision led to significantly lower sentences—

ROBERT MATTHEWS

for example, three years off a 10-year term—for about 4,000 people, 21 percent of the drug offenders sentenced by federal courts that year.

On the other hand, Congress has blocked the commission's attempt to do away with especially harsh sentences for crack cocaine, which is treated as if it were 100 times worse than cocaine powder, even though the active ingredient in the two substances is identical. A first-time offender with five grams of crack gets five years in federal prison; he would need 500 grams of cocaine powder to trigger the same penalty. Since nine out of 10 federal crack defendants are black, this policy has a strikingly disproportionate racial impact. Rep. Charles Rangel (D-N.Y.), ordinarily a hard-line drug warrior, has introduced a bill that treats crack and cocaine powder the same for sentencing purposes. The other members of the Congressional Black Caucus also support this reform, while the Clinton administration favors reducing the disparity rather than eliminating it.

At the state level, the most dramatic change has occurred in Arizona, where a 1996 ballot initiative required that nonviolent people convicted of drug possession receive probation. The state legislature tried to override the initiative, but voters approved it again in November 1998. Last year in Connecticut, the state legislature unanimously passed a bill that allows parole for nonviolent drug offenders who have served at least half of a two-to-four-year term; previously, such prisoners were eligible for parole after serving at least two-thirds of their sentence. Also last year, Michigan changed its 650 lifer law, making the minimum sentence 20 years and allowing parole after 15. The parole provision was retroactive, so the 220 people already serving life sentences became eligible for future release.

In New York, Pataki has backed away from his initial criticism of the Rockefeller drug laws and suggested only marginal changes. Last May, he proposed allowing appellate judges to reduce the 15-year minimum to 10 years for first-time offenders convicted of possessing small drug amounts. Even that minor reform was tied to his demand for eliminating parole. Meanwhile, the Democratic legislators who were once reliable critics of the Rockefeller drug laws are avoiding the issue, worried about seeming soft on crime.

In other states, there is still support for cracking down even harder on drug offenders. Last year, a group of 38 Republican legislators in Kansas pushed a bill that would have required a life sentence without parole for anyone convicted of growing 100 or more marijuana plants. They were thus proposing to treat marijuana growers more harshly than first-degree murderers, who in Kansas are eligible for parole after serving 25 years.

Nevertheless, there has been a notable change in the climate of opinion among supporters of the war on drugs. Joseph Califano, president of the prohibitionist Center on Addiction and Substance Abuse, declared last year that "mandatory minimum sentences are a round-trip ticket back to jail and into a life of crime." Even Ed Meese, attorney general when Ronald Reagan signed the legislation establishing most of the current mandatory minimums, is having second thoughts. "I think mandatory minimum sentences for drug offenders ought to be reviewed," he told *The New York Times* in May. "We have to see who has been incarcerated and what has come from it."

Toward the end of his *National Review* article, DiIulio suggested that opponents of prohibition make it harder to win repeal of mandatory minimums because they "too often characterize all persons incarcerated for drug crimes as casualties of the War on Drugs." Libertarians, of course, would insist that thugs should be locked up for violating other people's rights, not for engaging in consensual activities such as drug dealing. And it's important to keep in mind that prohibition encourages property crime by inflating drug prices and fosters violence by creating a black market. More than one-fifth of the male prisoners in DiIulio et al.'s Manhattan Institute study said they got involved in crime to raise money for drugs, and some drug offenders may have a history of violence because they tried to protect their own lives and property within the context of a black market. We have no way of knowing whether these same individuals would be getting arrested in the absence of prohibition, but it seems likely that at least some of them would not.

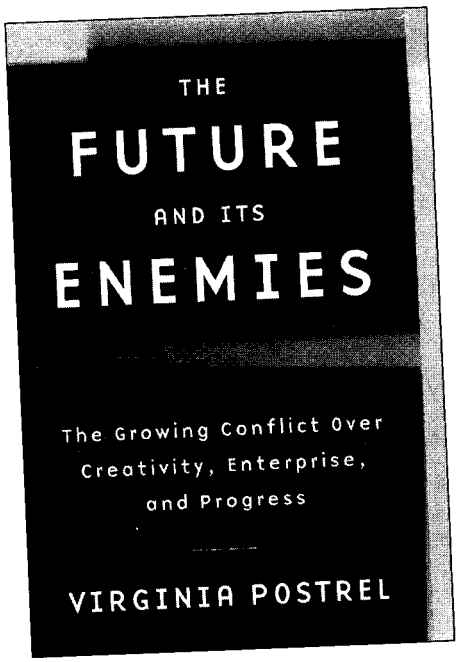
Still, DiIulio has a point: It is easy for critics of the war on drugs to imagine that everyone locked up for drug offenses is a medical marijuana user or a hapless mule who swallowed condoms full of heroin out of financial desperation, rather than a vicious, ruthless criminal. But if opponents of prohibition have too rosy a view of drug offenders, policy wonks like DiIulio have been guilty of the opposite error, implying that virtually everyone incarcerated for a drug crime is a predatory criminal. The reality, it seems, is quite different, and DiIulio has been courageous enough to admit that. "You've got to give him credit for being willing to stick his neck out and change," says Stewart, the president of FAMM. "I wish politicians would do that too." ◆

There has been a notable change in the climate of opinion. Even Ed Meese, attorney general when Ronald Reagan signed the legislation establishing most of the current mandatory minimums, is having second thoughts.

Senior Editor Jacob Sullum (jsullum@reason.com) is the author of For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health *(The Free Press).*

"Brilliant"

—James K. Glassman, *The Washington Post*



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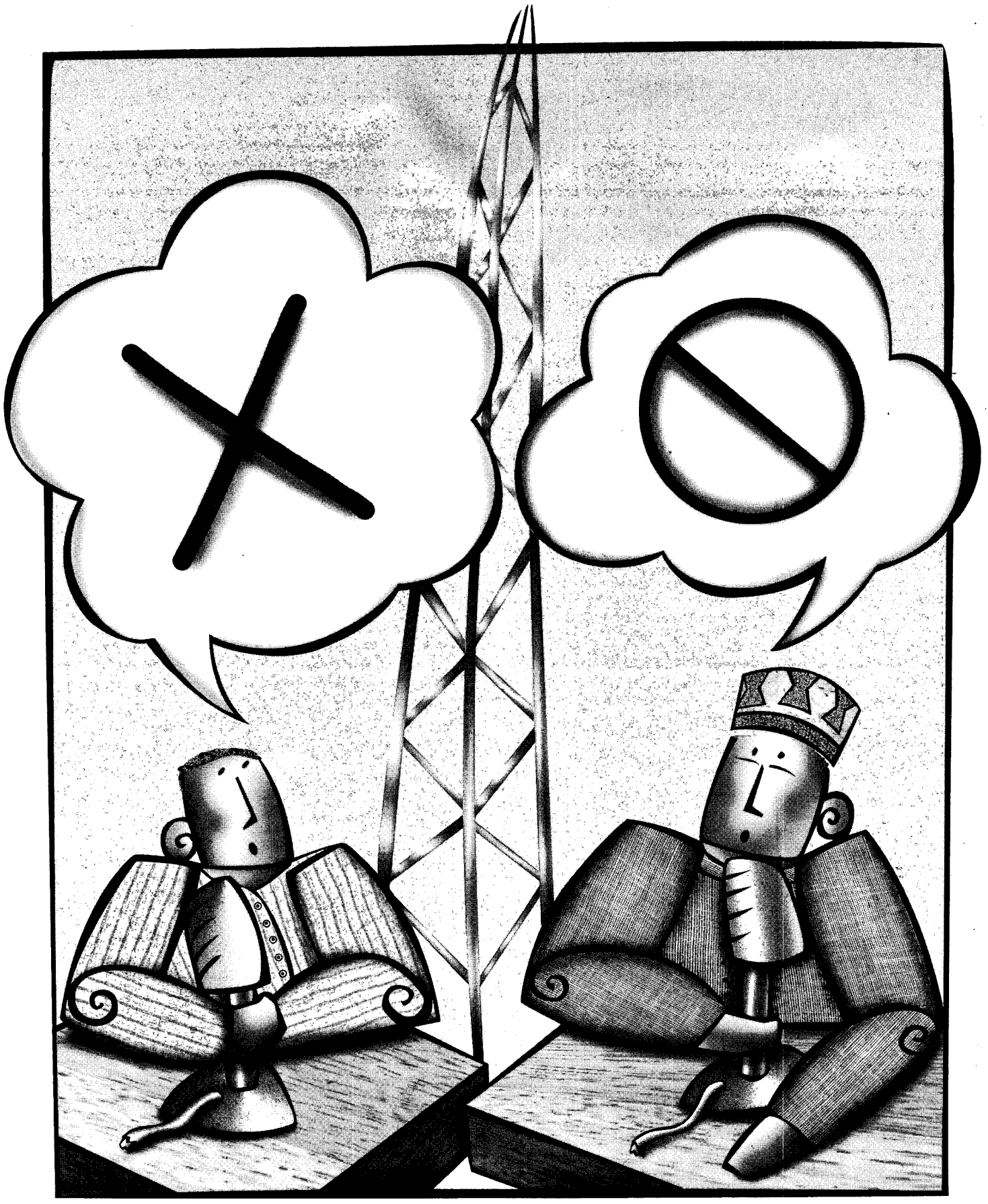


DEAD AIR

When the FCC shuts down pirate broadcasters, it sometimes unplugs whole communities too.

It's a routine afternoon at the Pure Funk Playhouse in Miami's Liberty City neighborhood: A couple of DJs are hanging out in the shade of a Ryder truck after a morning's work—a pro bono "Stop the Violence" assembly at a nearby middle school. Classes are done for the day, and a few local teenagers and other hangers-on are sitting in the doorway, waiting for a local dance team's daily drills to start. A few feet away, a disheveled man crunches by on a bicycle, apparently unconcerned that his rear wheel lacks a rubber tire.

Until a year ago, there would have been one more activity going on—a live broadcast from Hot 97, (97.7 FM)—and about 50 more kids hanging out. Sometime between 2 p.m. and 3 p.m. each day, Brindley Marshall, aka "Bo the Lover," would have slipped behind the microphone for his afternoon show, mixing the latest jams for his younger listeners with oldies for their parents. When circumstances warranted, he would use the station for live call-in talk about the issues of the day. A police officer might stop by to "shout out" to a wife or girlfriend or to deliver a message for Bo to pass on to his young, sometimes volatile listeners.

ELLEN PROCHNIK

But early on July 28, 1998, just as the sun peaked over the abandoned bank facing the playhouse, one of the station's DJs looked up and saw a mass of cops approaching. They were from the federal government, and they were there to help—help themselves to Hot 97's equipment, that is.

Hot 97 was caught in a Federal Communications Commission crackdown that closed 13 South Florida "pirate" radio stations between July 27 and July 31. FCC Chairman William Kennard hailed it as the "most successful, large-scale, enforcement action against unlicensed operators to date." Before the year was over, Kennard's cops would shutter another 21 stations in the area. The closed outlets ranged from the youth-oriented jams pumped out by Bo and his DJs in Miami to the all-gospel sound that Willie Brown Sr. had been airing in rural Homestead for 13 years.

Kennard, concerned with broadcast diversity, is making noise about licensing low-power radio stations and has proposed licensing them even as he has been shutting them down. Established broadcasters oppose his proposal through their Washington lobbying arm, the National Association of Broadcasters, and the idea is meeting resistance on the Hill. (See "Radio Waves," June.) In a May address to the NAB, Senate Commerce Committee Chairman and presidential hopeful John McCain (R-Ariz.) asked, "What possible diversity interest is advanced and what kind of opportunity is created by

By Michael W. Lynch

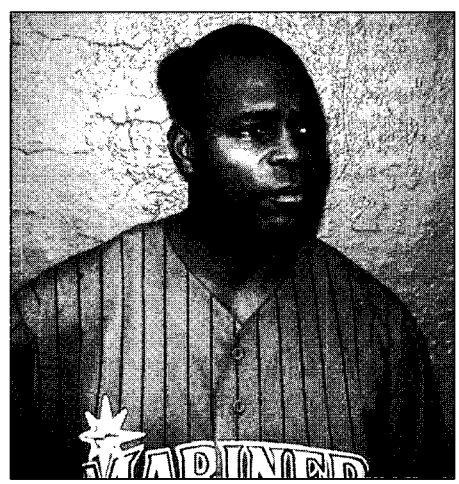
manufacturing thousands of new radio stations in an already overpopulated, transitional market?"

Both of these Florida stations, neither particularly unique among "pirate" broadcasters, answer McCain's question and vindicate Kennard's belief that micro radio is diverse radio, both in ethnicity and in programming. These Florida operations were in fact community tools, black-owned and operated businesses that served listeners otherwise being neglected.

"It amazes me that he was able to set up a radio station in this area," says Miami Police Sgt. Frank Dean, who calls Bo a great entrepreneur. "He keeps these kids employed."

There's not a lot to look forward to in Liberty City—a riot-prone neighborhood just north of downtown Miami that is distinguished by its vacant, trash-strewn lots and boarded-up buildings, some decorated with spray-painted "R.I.P." remembrances. The area's main commerce appears to be barber shops, small churches, laundromats, mom-and-pop groceries, and drugs. "It's the drug den of Miami," confirms one local activist who operates a teen pregnancy center across the street from the project where she grew up.

Even the feds are scared of the neighborhood. One of the officials who sleuthed out Bo's signal claimed in an affidavit that he didn't take any signal measurements at the time of a phoned-in complaint "due to the dangerous environment of the neighborhood where the station is located."



If the agent hadn't been so scared, he could have found the station without spending much of the taxpayers' money: The call numbers and telephone number are painted in large orange, white, silver, and black letters on the building's bright red, white, and yellow exterior. "Why try to hide?" asks Bo. "We didn't think we was doing anything wrong."

Not that Bo has never done wrong. He first made the papers at age a 21, when he held a gun to a bailiff's head in a Miami courtroom where his brother was standing trial. The courthouse soon got metal detectors; Bo got 12 years in state prison. But he emerged five years later, in 1989, determined to turn his life around. And by all measures he did. Starting with a new set of clothes, $100 release money, and a bus ticket back to Liberty City, Bo built a DJ business one piece of equipment at a time, playing at weddings and parties and producing his own dances at the local National Guard Armory.

"We started with a cheap system," says Bo. "You give me two speakers and come back a month from now and I'll have 10. Because I can make things happen. That's just the way it is." Today Bo owns nearly 200 speakers, enough equipment to keep 15 parties in music simultaneously.

Bo got interested in radio in the early 1990s, when he was doing promotional spots for another Miami station. When a friend said he could put him on air, Bo's only question was, How much? Bo spent $4,000 to go live with 100 watts. Within a year, and many thousands of dollars later, he was blasting 2,000 watts, covering all of Dade County.

Bo was not only doing well; he was also doing good. As a commercial venture, Pure Funk Enterprises was a booming success. His radio station pumped up his DJ business and he became an even more prominent figure in the community. No one was getting rich, but that was never the goal. Local youths, many of them formerly skirting on the edge of the drug economy, had something to do, even if it was only carrying the speakers. Take G-Money, a Pure Funk DJ who started carrying Bo's speakers in the early 1990s. "Before I got with Bo, I was into a lot of wrong. I was very violent. I got shot two times," he says nonchalantly, pulling down his shirt at the neck and exposing a penny-sized scar smack in the middle of his upper chest.

"Bo just totally changed my life," he says, later adding, "I would put on gasoline drawers and jump into a fire for him."

Miami Police Sgt. Frank Dean is also a fan of Bo's. Unlike the FCC officials, Dean works Liberty City's streets, as both a police officer and a Baptist minister, and is familiar with the drug-infested corner on which Bo chose to locate his business. "It amazes me that he was able to set up a radio station in this area," says Dean, who calls Bo a great entrepreneur. "He keeps these kids employed." Rodney Baltimore, the morning DJ with the licensed Hot 105.1, agrees. "These kids have done what the middle class has been unable to do: They got a black-owned radio station in Miami. They are making something out of nothing."

Bo's Pure Funk Enterprises also gives back to the community. When an errant bullet cut down a young girl on Martin Luther King Day in 1997, Hot 97 DJs took to the air and raised $7,000 for her fam-

ily. Hot 97 had one weekly show that addressed the issue of teen pregnancy and another that dealt with the self-esteem of adolescent girls. Bo's Pure Funk DJs still provide music for a series of "Stop the Violence" assemblies at Miami area schools. "He has a tremendous following with the kids," says Baltimore. "He may not get a NAACP Image Award, but he will get the hearts and souls of the people who listen to him."

But few people are listening to him these days. When the police bust was splashed all over TV, clients thought the government had carted off his DJ equipment along with the broadcasting equipment. "It took us down, slap down," says Bo.

He's trying to get his equipment back and secure a broadcast license, but neither pursuit looks like it will be successful anytime soon. The community rallied behind Bo, sending the FCC some 11,000 signatures in support. The government ignored them; licensing, an FCC spokesman told the *Miami New Times*, is not a popularity contest. Elected office is, however, and the signature drive caught the attention of local politicians. Bo says many, including Rep. Carrie Meek (D-Fla.) who represents the area, offered support. But he's not happy with the follow-through. "I even went as far as to go up to Washington," he says, adding, "If they had stuck to their word, we would have already been on the air a long time ago."

Brindley Marshall, a.k.a. "Bo the Lover" (opposite page) and with some of his DJs (above): "These kids have done what the middle class has been unable to do," says Miami DJ Rodney Baltimore. "They got a black-owned radio station in Miami."

In Homestead, nearly an hour south of Miami, Willie Brown Sr. is also familiar with politicians and the FCC. The 63-year-old has been a community activist since nearly the day he arrived in Homestead in 1945. He came to live with his grandmother, who earned her living working in the fields. His dining room wall is covered with dozens of plaques from appreciative governments and organizations. Both July 15, 1995, and May 25, 1996, were declared Willie Brown Sr. Day by Dade County. He was honored on the floor of the U.S. House of Representatives on May 21, 1996. And there's a picture he's very proud of—himself cheek to cheek with a blushing Hillary Clinton, taken in 1997. He was the first black man to get his picture taken with the president's wife, says one local resident in a telling overstatement. You know he must be somebody.

But he wasn't somebody enough to save his radio station of 13 years, WLUV 90.9, when the FCC, U.S. marshals, and local police arrived on his doorstep July 30. Willie was resting when they arrived mid-morning. His radio equipment was off-line, since he'd been alerted that the sweep was taking place. It didn't matter—they took everything anyway. Recalls Willie: "The guy asked me, 'Do you have any weapons?' I said, 'Only two.' So I showed him the Bibles. He looked at me like I was crazy. I said, 'That's all I need.'"

Brown needed just one more thing to keep pumping his 100 watts of gospel music and community announcements to the residents of Homestead and nearby Florida City—a license. It's just that he couldn't seem to get one. He says he asked three times over the years, and the answer came back the same each time: no. So he did the next best thing to going legal: He stayed on the air and tried hard not to step on anybody's toes. He knew it was illegal, but so is jaywalking at a deserted intersection at 4 a.m. He wasn't interfering with anybody, and he was providing a needed service, since most stations serving the greater Miami area cut out north of Homestead. "It was like civil disobedience," explains Brown. "You try to do things to get people the services that they need."

In some ways, Homestead is a world away from Liberty City. Liberty City is multicultural, youth oriented, and urbane. Homestead is an agricultural community on the edge of the Everglades. It's rural, culturally segregated, and, at least for many of Willie's listeners, aging. Yet in other ways they could be sister cities.

Fourth Street, once the heart of a thriving community of farm workers, is showing fatigue. The buildings are boarded up, lots lie vacant (albeit with a bit less trash than those in Liberty City), and the only going concerns are barber shops, mom-and-pop grocery stores, and laundromats. Small houses line the side streets, many with boards replacing windows blown out in the 1992 hurricane.

Willie Brown Sr. and Hillary Clinton: He was the first black man to get his picture taken with the president's wife, says one local resident in a telling overstatement. But that wasn't enough to save his station.

Drive through the streets of Liberty City with Bo, and women and men, boys and girls, will call out his name. Walk into a grocery store, or a school for that matter, mention Bo, and eyes will light up. Ask them about Bo's Hot 97, and you'll get an earful about what he meant to the kids, how he used the station to help ease tensions between young black males in the community and the police, and how he could draw crowds to his events. For residents of Liberty City there seems to be a sense of ownership, and pride, in Bo's Hot 97.

In Homestead, Willie is known as "Brother Brown," to the locals, black and white. If you drive around town with Willie, be prepared to make many stops so former listeners can tell you what the station meant to them and how much they miss it. According to one perhaps apocryphal story, the operator of the local rest home phoned Brother Brown with a problem. It seems the residents were refusing to take their baths, afraid that they would miss something important on the radio.

With Brown off the air, person after person complains, nobody knows what's going on in the community, who's sick and who has died. After 13 years of broadcasting gospel music and community announcements, keeping track of who was doing what in Homestead, WLUV had become an integral part of the community and a soothing companion, especially for religious residents who spend much of the day at home. "The older people were really pissed," says the manager of Allen's By-Rite, a grocery store in downtown Homestead. Adds Mary Major, a loyal listener and professional babysitter, "We ain't got nothing to listen to [except that] that old nasty, stinking blues all day. And a person into the church doesn't want to hear all that rickety-rackety stuff."

The issues affecting Homestead and Liberty City may be different, but the radio stations seem to play surprisingly similar roles in both communities: spontaneously evolved, locally controlled community centers.

This is exactly as Brown wanted it. He has already written the epitaph for his gravestone: "He Tried to Make a Difference." When asked what's the most important thing he's done in his life to earn this inscription, he cites his radio station, not his founding of the Martin Luther King Day Parade, the African American Festival, or even the community center for which he worked to secure government funding. "We never had the means to communicate with the community," explains Brown. "With the newspapers, people don't read. With the radio they were there in the morning and afternoon."

In his own way, this was Bo's motivation too. "I was not an angel. I did some wrongdoing," admits the 36-year-old Bo. "I looked back on my life and the things that I've done, and I said, 'I don't want people to be like me, because I see a lot of kids out there doing the things that I used to do.' The point is to get the message across."

Today, the studio from where Brown broadcast for 13 years looks like it was hit by Hurricane Andrew. Bo's is in a little better condition: A June 1998 American Red Cross plaque inscribed, "For the Love of Us," is propped next to counter where the FCC took Bo's turntable just a month later. Neither Brown nor Bo likes to think about the raids. Willie hasn't even worked up the stomach to spend the hours necessary to put his studio back in order. He just keeps the door closed. Like Bo, Brown wants to get a FCC license and go legal. He too has sent thousands of signatures to the FCC. Both the Homestead and the adjacent Florida City governments passed resolutions urging the FCC to let Brown back on the air. Still he knows it will be tough, as the NAB fights to keep the stations silent.

"They don't care about the little ladies who will never walk again, or can't get out, and can't go to church," says Brown. His more pessimistic moments may sadly be his most realistic. "If God himself came down, they wouldn't give him a license." ◆

Michael W. Lynch (mlynch@reasondc.org) is REASON*'s Washington editor.*

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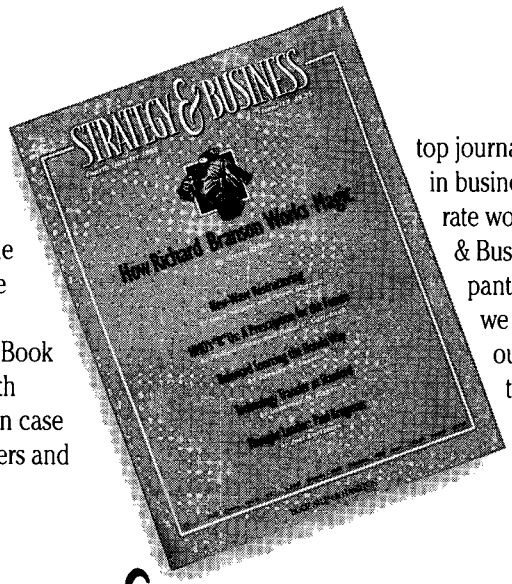

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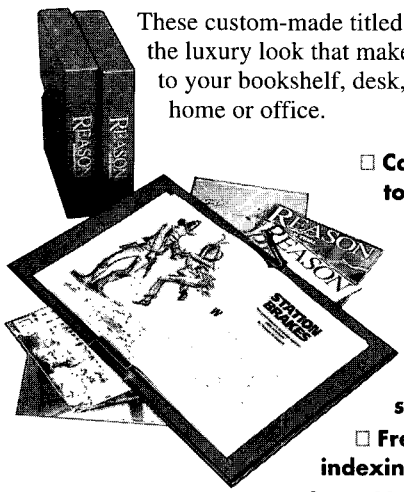

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Forced Payment

Clinton's Social Security reform would rob teachers, ministers, and cops.

By Richard Miniter

President Bill Clinton's recently announced plan to "save" Social Security contains a little-noticed provision that will wreck the retirement plans of millions of public school teachers, ministers, and rabbis.

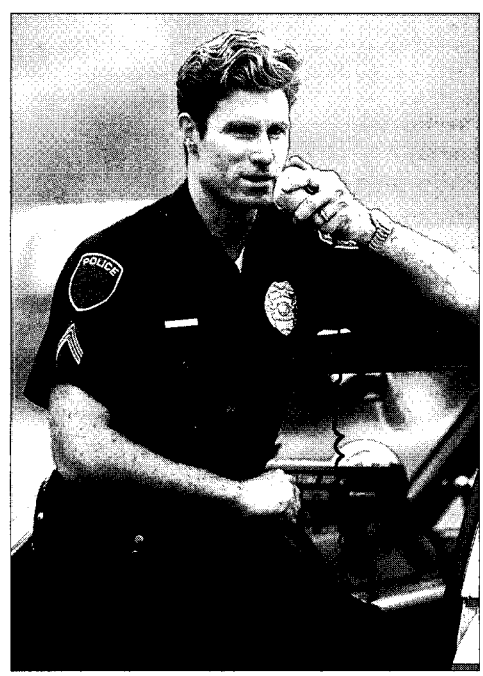
"It's our worst nightmare," Bob Shreve, a retired Ohio school teacher, told the Associated Press. Shreve is one of more than 5 million state and local government employees now exempt from Social Security. Another 100,000 clergy are also exempt. Unlike more than 90 percent of American workers, they pay no FICA taxes. Instead, they pay into private retirement accounts that are generally superior to Social Security.

But Clinton is about to change Shreve's life. The president has teamed up with Sen. John Breaux (D-La.), the ranking member on the Senate's Special Committee on Aging, to force all exempt employees into Social Security.

This is the closest Washington will come to grappling with Social Security reform in the next two years. The Social Security reform debate may rage on in policy think tanks, but Congress wants to avoid any contentious debates until after the 2000 elections. Clinton cannot consider genuine reform; he is too beholden to the labor unions and liberal interest groups that supported him during his scandals. But a Social Security shortfall looms, and the president wants to be seen as doing something even as he pushes the problem onto the next administration.

The usual political fixes no longer work. Old standby remedies, last employed during the 1983 crisis, involved raising the retirement age, cutting benefits, and boosting taxes. But the American Association of Retired People, one of Washington's most powerful lobbying groups, opposes any increase in the retirement age or reduction in benefits, even for the handful of millionaire retirees. Raising Social Security taxes is also a nonstarter. The majority of Americans, including nearly all of those who earn less than $40,000 a year, pay more in Social Security taxes than in federal income taxes—they won't want to pay more. The president also knows that the GOP-led Congress would oppose a tax hike. The president's other Social Security brainstorm, a plan to allow the government to invest in stocks, has been blocked by vocal opposition from Federal Reserve Chairman Alan Greenspan.

From the White House's perspective, only one option remains: Tax those who are currently exempt. That's why the White House has endorsed corralling into the system the relatively small number of people whose retirements are secure outside it. Though it could impoverish teachers and clergymen—and "save" Social Security for only another two years—this approach lets the president claim that he is "reforming" Social Security.



Call for Backup: Pensions for cops will be lynched by Clinton's plans.

When David Vienna, a lobbyist for the exempt workers and retirees, confronted White House officials about the plan in January 1999, they offered two justifications. First, they contended, it is a matter of simple fairness that coverage should be universal. Second, Vienna says, they told him, "We need the money." Both of these arguments are flawed.

The fairness and universal coverage argument turns on a typically Clintonian definition of the words *fair* and *universal.* Low earners pay less into the system than they receive in retirement checks, a fact trumpeted on the government's Social Security Web page. This is where "fairness" comes in: It is only *fair* that everyone receive a certain guaranteed minimum payment for their declining years. And here's where the "universal coverage" plays a role: For the low-earner subsidy to continue, many middle-class earners, who, on average, get back less than they pay into the system, need to be forcibly kept in it. Thus "fairness" and "universal coverage" are shorthand for a New Deal–style redistribution of wealth.

The element of "fairness" in this argument is certainly open to question. But the logic seems especially hard-hearted when used to defend Clinton's Social Security plan.

Roping the exempt workers into Social Security seems unfair because they are only a few steps ahead of the low-earners that the president says he wants to protect. They are solidly middle-class Americans who, ironically, vote predominantly for Democrats. Forty percent of the 5 million exempt public employees are school teachers, according to the National Conference of State Legislatures. The rest are local- and state-government employees in 14 states, some older federal workers, police officers,

sheriff's deputies, and firefighters, as well as ministers and rabbis, says Tom Lucier, a spokesman for the Coalition to Preserve Retirement Security. Californians will be among the hardest hit: The employees of more than 280 cities and 1,000 school districts in that state are now exempt from Social Security, according to a recent study by the state pension system.

The president is trying to move such people from what is now a safe and generous retirement system to one set to go bankrupt in a few decades. Why send the lifeboats back to the Titanic? The average wage earner can expect Social Security to replace only about 42.4 percent of his pre-retirement income, according to the House Ways and Means Committee's *1994 Green Book: Overview of Entitlement Programs.* Though the plans vary widely, most exempt employees will receive about two-thirds of their pre-retirement income in pension checks—a much better deal than Social Security. In some cases, the gap between the return offered by Social Security and exempt pension plans is even wider.

Why do the exempt plans provide so much more? First, the pension money is actually invested in the safe end of the stock market, which grows at an average of 6 percent to 8 percent a year, instead of being spent by the government in exchange for the promise of a check in the future. (The idea that the stock market is risky for long-term investors is false; over any 15-year period in American history—including from the crash of 1929 to the war year of 1944—the stock market has always produced positive returns, according to Ibbotson Associates, a Chicago-based investment consulting firm.)

Second, pension fund managers are directly accountable for the success of their investments and issue quarterly reports. If exempt workers find the investments too risky, or even too safe, they can switch funds—a choice obviously not offered by the federal government. Another advantage for the exempt plans: The plans tend to provide more generous disability and survivors' benefits. Small wonder that a 1997 study by the nonprofit group Third Millennium, titled *Freed from FICA*, concluded that exempt employees are better off outside of the Social Security system.

Clinton's plan to make currently exempt employees pay FICA taxes will seriously weaken the financial health of the exempt plans. Forcing new state employees to join Social Security will mean large reductions in the benefits already promised to current and future exempt retirees, according to a study conducted for the State Teachers' Retirement System of Ohio. Buckeye State employees pay 9.3 percent of their salaries into the state retirement plan. The state contributes another 14 percent, for a total contribution of 23.3 percent of the employee's salary. These contributions pay for a broader range of retirement benefits than does Social Security, including retirement income, disability benefits, survivors' benefits, and an old-age health care fund. If the Clinton-Breaux plan is adopted, more than half of those contributions—12.4 percent of each em-

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ployee's income—will be diverted from pension plans to Social Security payroll taxes. One of the most popular features of the Ohio plan, retiree health insurance provided to all recipients regardless of age, could be bankrupted, forcing retirees to rely on Medicare alone. "The money has got to come from somewhere, and a lot of municipalities are already taxed to the limit," said Bob Scully, who heads the 220,000-member National Association of Police Organizations. "If this passes, it is going to affect benefits."

It is easy to see why Scully is upset. Some 75 percent of the country's police, firefighters, and other public safety employees are currently exempt from Social Security. Their plans are tailored to meet the special needs of their stressful and often dangerous professions, providing early retirement benefits and more generous death and disability benefits. By contrast, Social Security will pay disability compensation only when an individual is completely incapable of working at any job—and, even then, the benefits are miserly by comparison. An injured Ohio firefighter who works part-time at a desk would receive 60 percent of his former salary under his exempt plan—but nothing from Social Security. If he dies, his wife and children can expect to receive a lump sum equal to at least one year of his salary. By contrast, Social Security would provide a single, one-time $255 payment—not even enough to pay for a no-frills funeral. It doesn't sound very fair at all.

Even on its own terms, the plan doesn't seem like a good deal. Why increase Social Security's liability by 5 million new beneficiaries for such a relatively small gain?

What about the claim that the federal government needs the money to shore up Social Security? The Clinton-Breaux plan raises $11.3 billion over five years, according to the Congressional Budget Office. That is almost enough to buy two more years of solvency; putting off the day of reckoning from 2030 to 2032, by one estimate. Even on its own terms, this doesn't seem like a good deal. Why increase Social Security's liability by 5 million new beneficiaries for such a relatively small gain? And it is fair to ask, What do they need the money for? After all, the current budget surplus is entirely the result of a Social Security tax surplus. In the short run, the system has more money than it needs to pay current beneficiaries. But the president wants to spend the surplus—and the funds raised by taxing exempt employees—on an array of new proposals.

There are other flaws to the Clinton-Breaux plan. Some state constitutions mandate that all promised state benefit obligations be honored, regardless of the financial burden imposed upon the state; in such cases, new taxes will have to be levied to honor these obligations. The Clinton-Breaux plan is both a back-door tax increase and the kind of "unfunded mandate" the GOP once swore to oppose.

The Clinton-Breaux plan also violates the original promise of the Social Security system and does so in a way that should make us suspicious of any government claims about the system's future. When the Roosevelt administration dreamed up Social Security in 1935, the stated goal was to guarantee that industrial workers would have secure pensions. With the Great Depression threatening the life of so many enterprises, it seemed like a good idea to provide these workers with an independent, guaranteed retirement plan. Public employees were specifically excluded because Congress recognized that they were already safe from the swing of private sector fortunes.

Then President Roosevelt made a promise that revealed his administration's redistributionist aims. FDR allowed workers who retired after 1936—no matter how little they paid in—to collect full benefits immediately. That meant that the system had to expand to cover the costs of these unfunded liabilities. Small-business owners, farmers, doctors, and others who traditionally funded their own retirements were gradually forced into the system. Today, more than 148 million workers pay into a system that was just supposed to protect the working poor from poverty in old age.

After most private sector workers were absorbed, the federal government targeted other government workers—even though their retirements were secure. In 1954 Congress amended the Social Security Act to let states and municipalities voluntarily cover their public employees under Social Security. Some opted in, others stayed outside the system. This voluntary agreement was revoked in 1983, when Congress made it illegal for states and municipalities to continue to set up alternative retirement plans for their employees; only pension plans pre-dating the 1983 amendments were allowed to enroll new employees.

At the same time, all new federal employees were forced into Social Security. (Congress maintained that the 1983 amendments would ensure Social Security's solvency for at least another 75 years; a mere 16 years later, Social Security is again facing bankruptcy.) In 1990, the Social Security Act was amended again to force any public employee not already enrolled in an exempt plan into the system. Clinton proposes to close this last loophole, forcing the last handful of exempt workers into the Social Security system.

Soon there will be more people receiving Social Security checks than there are paying into the system. By the time the baby boom generation retires, the imbalance between payers and payees will probably be too great to sustain. That's why a Third Millennium poll shows that Americans aged 18 to 25 believe they are more likely to see a flying saucer than a dime from Social Security.

There is a better way: Let those whose retirements are already assured stay outside the system. Clinton and Congress should find a real fix for Social Security, one that doesn't ruin the retirements of teachers, clergy, and police officers. ◆

Richard Miniter (rminiter@aol.com) is a Washington, D.C., writer whose work appears in The Wall Street Journal, Reader's Digest, The Atlantic Monthly, *and other publications. He is a visiting fellow at the Lexington Institute, an Arlington, Virginia-based free market think tank.*

The Day They Came to Sue the Book

The courts take out a contract on free speech.

By David Kopel

Is a publisher legally responsible for the crimes perpetrated by one of its readers? In America, the answer now is "yes."

After serving several years in Michigan's Jackson State Prison for violent felonies, James Perry was released and soon went into business for himself—soliciting clients who wanted someone killed.

Later, Perry ordered two books from Paladin Press, *How to Make Disposable Silencers* and *Hit Man: A Technical Manual for Independent Contractors.*

Perry eventually met up with Lawrence Horn, who took out a contract on his ex-wife, Mildred Horn, and their quadriplegic son, Trevor. Trevor had won $1.7 million in a medical malpractice lawsuit, and Lawrence wanted the money for himself.

On March 3, 1993, Perry murdered Mildred, Trevor, and Trevor's nurse, Janice Saunder.

Perry had done a poor job of covering his tracks, and when investigators searched his home they found a Paladin Press catalog. Contacted by the police, Paladin could have invoked the First Amendment. That's what Kramerbooks and Barnes & Noble did in 1998, when Kenneth Starr subpoenaed them to discover whether Monica Lewinsky had bought the novel *Vox.* But Paladin did not even ask for the formality of a subpoena. It immediately turned Perry's purchase order over to the police.

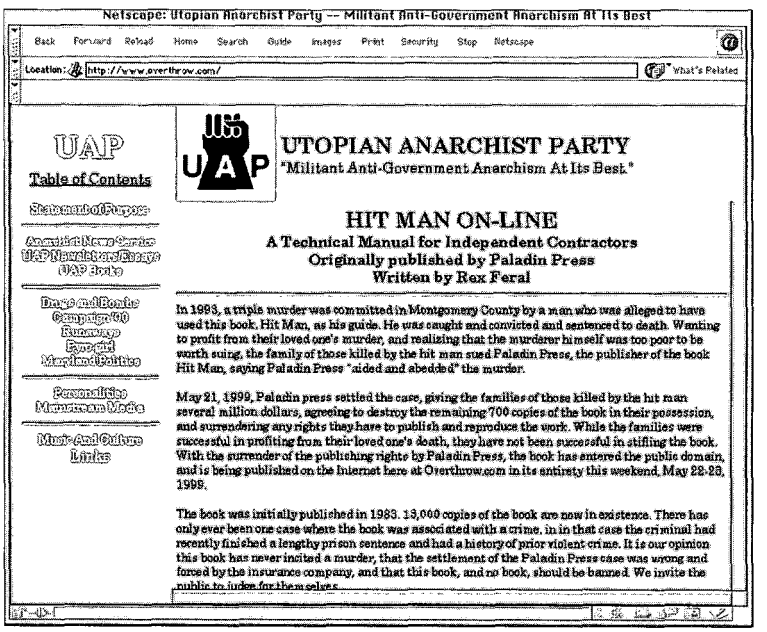
Lawrence Horn was sentenced to life in prison; Perry was sentenced to death. Then Mildred's relatives hired attorney Howard Siegel for a civil case. Siegel had won the huge malpractice award for Trevor that had prompted the murders. He was more famous, however, for a 1985 case, *Kelley v. R.G. Industries,* in which he convinced the Maryland Court of Appeals to hold manufacturers of small, inexpensive handguns "strictly liable" for injuries resulting from their criminal misuse. (The decision was later voided by the Maryland legislature.)

The actual killer, James Perry, wasn't much of a lawsuit target; his check for *Hit Man* had bounced. Thus was born the case of *Rice v. Paladin.* Calling Paladin Press "despicable," Siegel announced that his suit was aimed at destroying the publisher.

What made Paladin so odious? The Boulder-based press has long published practical books for anti-establishmentarians, teaching such skills as how to build a rural home without connecting to the electricity grid, how to survive disasters, how to pass drug tests, and how to defend yourself. A lot of its books make an overt appeal to do-it-yourselfers but sell mostly to Walter Mittys. For instance, the new Paladin title *Contingency Cannibalism: Superhardcore Survivalism's Dirty Little Secret* would not have much economic viability if it sold only to cannibals. Rather, its market includes people interested in reading about an unusual topic, people interested in speculating about unlikely circumstances, and the like.

Similarly, Paladin has sold over 20,000 copies of *Hit Man: A Technical Manual for Independent Contractors.* The book's pseudonymous author, "Rex Feral" (King of the Beasts), is not, as the book pretends, an actual hit man. She is a divorced mother of two who needed money to pay her property taxes. When she submitted a fictional manuscript about a hit man to Paladin, the press asked her to change the style to a "how to."

Yet the book's commercial success was not with persons who actually wanted to *do* a contract murder. Other than James Perry, the only customer known to have used *Hit Man* in a crime was a killer who followed some of the book's suggestions about how to dispose of a dead body. The other 20,000 buyers were apparently people interested in reading a "true crime" book, or getting tips for writing such a book. Perhaps some hyper-vigilant readers wanted to know how contract killers operate, so as to take precautions against them. Some, no doubt, were simply attracted by the book's notoriety: The title's sales rate doubled in the years following the lawsuit. And there were certainly some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A Technical Manual for Independent Contractors
Originally published by Paladin Press
Written by Rex Feral
In 1993, a triple murder was committed in Montgomery County by a man who was alleged to have used this book, Hit Man, as his guide. He was caught and convicted and sentenced to death. Wanting to profit from their loved one's murder, and realizing that the murderer himself was too poor to be worth suing, the family of those killed by the hit man sued Paladin Press, the publisher of the book Hit Man, saying Paladin Press "aided and abedded" the murder.
May 21, 1999, Paladin press settled the case, giving the families of those killed by the hit man several million dollars, agreeing to destroy the remaining 700 copies of the book in their possession, and surrendering any rights they have to publish and reproduce the work. While the families were successful in profiting from their loved one's death, they have not been successful in stifling the book. With the surrender of the publishing rights by Paladin Press, the book has entered the public domain, and is being published on the Internet here at Overthrow.com in its entirety this weekend, May 22-23, 1999.
The book was initially published in 1983. 13,000 copies of the book are now in existence. There has only ever been one case where the book was associated with a crime, in in that case the criminal had recently finished a lengthy prison sentence and had a history of prior violent crime. It is our opinion this book has never incited a murder, that the settlement of the Paladin Press case was wrong and forced by the insurance company, and that this book, and no book, should be banned. We invite the public to judge for themselves.

Web Hits: Ironically, the suit against Paladin Press has made *Hit Man* available to more people than ever before.

readers who liked to *imagine* perpetrating a crime. (They would be similar to the audience for books like *Perfectly Criminal*, from the British Crime Writers Association: "Discover the secrets of the perfect crime...COULD YOU COMMIT THE PERFECT MURDER?...*If you find you need help, here are some tips from the masters of the art.*" No one as yet has sued the BCWA.)

Despite Siegel's claim that "Paladin Press has established itself as a correspondence school for crime," there isn't enough money to be made in a mail-order bookstore whose main customers are hit men and cannibals. Indeed, if Paladin were marketing mainly to criminals, it would not retain records of who buys its books and would not voluntarily turn those records over to law enforcement when asked about a particular crime.

The plaintiffs in *Rice v. Paladin* claimed Perry used 22 techniques he had learned from *Hit Man*. On closer examination, the number shrank. For example, *Hit Man* discusses client solicitation by the contract killer, and Perry did solicit clients. But he started soliciting long before he read the book. Another dubious parallel: The book said to use a .22 caliber AR-7 rifle, and to shoot the adult victims in the eye to reduce blood splatter. Perry did this. But even if we assume that Perry chose an AR-7 because of *Hit Man* (rather than because Perry, as a convicted felon, could buy only on the black market and had to take what was available), what difference did that detail ultimately make? Perry was going to commit the crime anyway. If Perry had chosen some other gun, the victims would still be dead.

If anything, Perry didn't read *Hit Man* carefully enough. The main reason he was caught was because he registered under his own name at the Day's Inn where he stayed the night before the murders, despite the book's advice to use a pseudonym. A few hours after the murders, Perry called Lawrence Horn long distance, thus providing another key piece of evidence against himself—and disregarding *Hit Man* once more.

Initially, the federal trial judge threw Siegel's case out on summary judgment, ruling that there was no need for a trial. The 1969 Supreme Court decision in *Brandenburg v. Ohio* had held that the government cannot "forbid advocacy of the use of force or of law violation" unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." To meet this standard, Siegel had to argue that Perry's murders were imminent when he bought *Hit Man*, even though 14 months had elapsed before he carried them out.

But in November 1997, the U.S. Court of Appeals for the 4th Circuit reversed the decision and said the trial against Paladin should go forward. How could the 4th Circuit reconcile their decision with the clear *Brandenburg* standards about protection of free speech? It couldn't.

Instead, it asserted that because *Hit Man* contained no express political or social advocacy, the book was not protected by the *Brandenburg* test—even though many other courts have applied *Brandenburg* to apolitical speech. Further, claimed the court, a jury could find that the book's *only* "communicative value" was "training persons how to murder." This was obviously false, given that only two of the book's buyers are known to be criminals. There is simply no analogy between *Hit Man* and a document intended solely for crime (e.g., bank blueprints drawn up for a robbery).

The 4th Circuit ruling in *Rice v. Paladin* is inconsistent with many cases from other federal courts finding that the First Amendment prohibits suits against authors or publishers of various instruction manuals for illegal activity such as drug smuggling or marijuana cultivation. The defendants appealed to the Supreme Court, which denied certiorari—as the Court usually does before a factual record has been developed through a trial. The case was set for trial on May 25, 1999. A few days before then, Paladin's insurance company decided to settle, paying several million dollars to Mildred and Trevor Horn's family. Paladin agreed to cease publishing the book and its remaining stock of 700 copies sold out within a day.

The Utopian Anarchist Party promptly posted the full text of *Hit Man* on its Web site (www.overthrow.com/hitmanonline.html), where the book is now available for free. Thus, the perverse result of Siegel's lawsuit has been to make *Hit Man* more widely available than ever.

But an ominous precedent has been set, paving the way for more censorship by lawsuit. It was this fear that prompted *The Washington Post*, the Society of Professional Journalists, and the Horror Writers Association to file amicus briefs in support of Paladin. Already, Oliver Stone is being sued for making *Natural Born Killers*, under the theory that the movie caused a robber to shoot and paralyze a clerk in a Louisiana convenience store. Refusing to dismiss the suit, the Louisiana Court of Appeals cited the 4th Circuit's *Paladin* decision. Thus litigation will go forward to discover what Stone's "intent" was in creating *Natural Born Killers*.

If Paladin were marketing mainly to criminals, it would not retain records of who buys its books and would not voluntarily turn those records over to law enforcement.

Who loses from such censorship? More people than you'd think. After all, a book that's useful to criminals can also be useful to law enforcement. Paladin's *The Ultimate Sniper* is used at the U.S. Army Sniper School in Fort Benning, Georgia, and by police SWAT teams all over the country. (If it can be proven that FBI sniper Lon Horiuchi read *The Ultimate Sniper* sometime before he killed Vicki Weaver at Ruby Ridge, Idaho, should her children have a right to sue Paladin?)

If Paladin is to blame for the murders, who else might find themselves in the dock? The U.S. Army, which trained Perry to kill people with the M-16 rifle (similar to the AR-7) and deliberately put him through a training regimen to desensitize him to the taking of human life? The State of Michigan, which let Perry out of prison after only a few years, despite two separate armed robbery convictions and an attempt

to murder a police officer? (Michigan needed the space for drug users.) Or perhaps Jackson State Prison itself? Almost all the techniques mentioned in *Hit Man* could be learned from prisoners there, according to a guard on Perry's unit.

Or should we blame Mildred Horn? She knew her ex-husband was a murderer: He had bragged to her that during his Navy service, he shoved a sailor off a ship's deck into the ocean and made it look like an accident. She also said that Horn had tried to kill her more than once, and she warned relatives that if she were killed, Horn would be responsible. But there is no evidence that she took protective steps, beyond having a burglar alarm installed and warning Saunder, Trevor's nurse, not to open the door to strangers when Mildred was away. Nor was there any evidence that Saunder, before she accepted her job, was warned that she might be putting her life at risk.

Is it realistic to claim that a book, which at most affected a few details of how the crime was committed, is more responsible than anyone except the actual criminals?

Is it realistic to claim that a book, which at most affected a few details of how the crime was committed, is more responsible than anyone except the actual criminals? State legislatures in Louisiana, Texas, Nevada, Georgia, Maine, and elsewhere have passed laws to stop cities from filing suits designed to destroy Second Amendment rights. Rep. Bob Barr (R-Ga.) has introduced similar legislation in Congress. The *Hit Man* case suggests that even broader reforms are needed, to protect the First Amendment as well as the Second.

David Kopel (DaveKopel@hotmail.com) is an adjunct professor at the New York University School of Law and research director with the Independence Institute in Colorado (www.i2i.org).

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Title IX's Invisible Ink

How the Supreme Court made up "student-on-student" harassment law

By Walter Olson

"Next year, kids will be suspended for behavior nobody's ever been suspended for," said Bruce Hunter of the American Association of School Administrators. He was forecasting the likely results of the Supreme Court's May 24 ruling, in *Davis v. Monroe County Board of Education*, that schools and universities which take federal money can be sued for damages in federal court if they do not respond adequately to complaints of student-on-student sexual harassment.

Most of the nation's editorialists joined the Clinton administration, feminists, and trial lawyers in hailing this new extension of harassment law. The Court "has caught up with the times," said the *Seattle Post-Intelligencer*. "Overdue," agreed *USA Today*. "Schools that teach students to respect each other will have nothing to fear," declared *The Hartford Courant*. Both the *St. Louis Post-Dispatch* and *American Lawyer* curiously described the decision as a "victory for students," seeming to forget that its whole point is to penalize schools for not punishing some students severely enough. Maybe the idea is that only accusers in these disputes truly count as "students," while the accused do not.

Singled out for applause by many commentators was the Court's allegedly stringent-yet-balanced new standard for liability: Schools pay damages only if they've shown "deliberate indifference" to "known acts of harassment" that are so "severe, pervasive, and objectively offensive" as to impair "equal access" to education. According to the majority opinion by Justice Sandra Day O'Connor, these curbs on liability should allay worries that "simple acts of teasing and name-calling" will end up as fodder for suits, or that courts will find themselves "second guessing the disciplinary decisions made by school administrators."

To four dissenters—Justice Anthony Kennedy, plus the Court's conservative wing—these reassurances seemed at best wishful thinking. Plaintiffs' lawyers, Kennedy predicted in his opinion, will soon be tailoring allegations to generate plausible lawsuits under the Court's standard. They might, for example, allege that "severe" and persistent teasing impairs a claimant's "equal access" to an education by interfering with her ability to concentrate in class; or they might cite a school system's failure to adopt approved sensitivity training as evidence of its "deliberate indifference" to misconduct. The result, said Kennedy, will be not only a massive shift of power from the local to the federal level but also an "avalanche" of liability and defense costs chargeable to hapless taxpayers. In hopes of dodging such suits, many schools "will adopt whatever federal code of student conduct and discipline the Department of Education sees fit to impose upon them."

Indeed, for several years already federal regulators have been twisting schools' arms to adopt anti-harassment policies, while individual suits have mushroomed around the country. "We already have a large number of these cases," an attorney who represents local school districts told the *Fort Worth Star-Telegram*. "We will see a whole lot more." The newspaper reported that Fort Worth schools were hit with a "deluge" of harassment complaints after school officials hired the Women's Center of Tarrant County to develop an awareness program in which students were shown a film encouraging them to file charges. In California last August, the San Francisco *Recorder* reports, the Laguna Salada Union School District in Pacifica "settled out of court for $160,000 after a mother accused school officials of failing to protect her 10-year-old son from anti-gay slurs."

That assertion may seem startling, so let me repeat it. The reason it's so hard to discern the exact boundaries of the clause in federal law that provides for private lawsuits over sex bias in education is that there is no such clause.

The replacement of local with federal authority, the prospect of endless litigation, the encouragement given to speech codes and other better-safe-than-sued precautions, the prospect of unforgiving crackdowns on childish misbehavior whose very childishness will be seen as no defense—all are legitimate worries after *Davis v. Monroe*. But there is a further problem that drew relatively little attention in the press but figured prominently in the Court's dissent. It has to do with the chief reason why the Court finds it so troublesome to interpret the provision in federal law authorizing damage suits against schools and colleges for sex discrimination: namely, that there is no such provision.

That assertion may seem startling, so let me repeat it. The reason it's so hard to discern the exact boundaries of the clause in federal law that provides for private lawsuits over sex bias in education is that there is no such clause. Courts have simply decided that it would be nice if such a right to sue existed, that it would advance the goals of sex discrimination law to have it in there, and that Congress must therefore have meant to create it. They have accordingly felt entitled to step into the gap and create the right from thin air—an "implied private right of action."

The implied private right of action has become the Little Man Who Wasn't There of our constitutional scheme, appearing again and again at the top of the stair to trip up unwary defendants, empower regulators, and enrich litigators. And the

exasperated tone of the *Davis* dissent suggests that more justices than ever may be losing patience with the affront to separation of powers—not to mention the principle-free jurisprudence—engendered by these imaginatively derived rights to sue. In *Davis*, the Little Man turned up once again, with incalculable consequences for the nation's school administrators; it's time he went away.

Congress is perfectly capable, when it sees fit, of creating rights for private parties to sue. That's what it did when it banned discrimination in employment and public accommodations in the Civil Rights Act of 1964. Eight years later, when it moved on to the question of sex bias in education, it passed quite a different kind of law. While the 1964 act applies to private parties generally, Title IX of the Education Amendments of 1972 applies only to schools and universities that accept federal money, and the law by its terms entrusts responsibility for enforcement only to the federal government, whose basic lever in imposing its will, it seemed safe to assume, would be the threat to cut off funding.

But it wasn't so safe to assume that. By coincidence the heyday of implied private rights of action had also commenced back in 1964, in a case where the Court blithely announced a new right for a company's shareholders to sue it for violating certain federal regulations even though no law giving them such a right could be found on the federal books. Soon the Court was spotting implied private rights of action all over the place, even in what seemed quite unpromising statutory material.

Thus, one statute had explicitly listed rights it was creating for private parties, and its list did not include a right to sue; the Court found an implied right anyway. In another case, it found an implied right in a statute whose backers had originally sought to include a private right to sue in the bill, but dropped that proposal to win the support needed for passage. The same Court also found it significant that, while the law under scrutiny said nothing about creating a right to sue, individual members of a subsequent Congress had spoken favorably about the idea.

Even at the giddy height of the Court's infatuation with its new Invisible Ink

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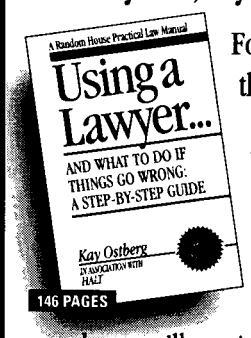
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Reading Method, however, it was clear that none of its members had any wish to apply the technique across the board. Civil rights statutes were prime candidates for the creative use of implication, but the Court declined many requests to conjure up implied rights in less glamorous economic and regulatory areas of the law. It wasn't easy to find a principled basis for such differences in treatment, and the purported guidelines the justices came up with to explain its decisions—such as whether a proposed new right would be "helpful to the accomplishment of the statutory purpose"—were embarrassingly well suited to making cases come out whichever way they wanted.

In the years since then, the Court's enthusiasm for finding hidden causes of action has cooled, and it has worked its way through at least three successive standards for when to infer rights and when not to. Though increasingly reluctant to read implied rights into statutes of newer vintage, it has retained a more elastic view of laws passed during its liberal period, such as Title IX—apparently on the view that since Congress back then knew the Court had a reputation for stretching laws, laws dating from that era may be stretched forever.

The result is a guessing game as to who can be sued over what. Private actors find it hard enough to forecast their liability and stay out of trouble in the case of statutes that are imprecisely worded but at least exist. When the statutes don't exist in the first place, the uncertainties naturally rise to a new level.

Until *Davis*, one of the few reliable rules of thumb in this area was thought to be that rights-by-implication were disfavored when they threatened to intrude into areas of traditional state concern (such as, say, school administration). In particular, the Court had indicated that if Congress intends to encroach on state autonomy by attaching expensive strings to federal money, it must speak "with a clear voice." But that guidepost now seems to have been flattened as well.

In practice, it would seem, the dimensions of today's Title IX right to sue are whatever O'Connor, the Court's moderate swing vote, says they are. Sometimes, as in *Gebser v. Lago Vista* (1998), which like *Davis* was decided by a 5-to-4 vote, she sides with the conservatives. In that case, schools avoided liability for teacher misconduct they didn't know about or couldn't have fixed. Other times, as in *Davis*, O'Connor joins the liberals but seems to negotiate them down to a compromise position professedly reserving the right to sue for severe or egregious cases, given "the inevitability of student misconduct and the amount of litigation that would be invited" by going further (to quote her opinion in *Davis*). There is a word for this process of drafting via negotiated tradeoff: *legislation.*

But legislation from the bench differs in its outcomes from legislation emanating from the branch that the Founders happened to entrust with that function, namely Congress. When Congress is forced explicitly to consider establishing rights to sue, regulated parties usually put up a fight and score some defensive victories. As a result of such resistance, the Civil Rights Act of 1964 and most similar laws limit the type and amount of damages that can be awarded under their terms. When courts invent implied rights, on the other hand, they typically decline to adopt limits to the damages that can be claimed thereunder—courts mustn't be arbitrary, after all. The outrageous result is that advocates of these laws can obtain a right to sue that is more expansive and lucrative if they sneak it in after the fact by judicial fiat than if they openly ask for it during congressional consideration.

As happens so often in the capital's perennial shell game, shifting the pea of responsibility from the more to the less politically accountable of the institutional walnuts enables both branches to evade constitutional limits on their power. Congress, eager for popularity, gets to endorse feel-good propositions (we're against discrimination) while handing off the unpleasant particulars (by the way, you might get sued under this law) to a branch more insulated from angry constituents.

In turn, as Justice Lewis Powell observed, the courts obtain a great deal of new power, and in particular are "free to reach a result different from that which the normal play of political forces would have produced." It's hard to escape the conclusion Powell himself drew: Liberal creation of implied rights of action "cannot be squared with the doctrine of the separation of powers."

Justice Antonin Scalia reached a similar conclusion in his concurrence in *Thompson v. Thompson* (1988). The costs of requiring Congress to be explicit about issues of such moment, he noted, are at most slight. The costs of the guessing game over claims of implied rights, experience has now shown, are severe and continuing. The safer course, as well as the more constitutional, would be for the Court to announce that rights to sue will not henceforth be derived from statutory silence, thus giving Congress an unmistakable signal that it must reshoulder its proper responsibility. "If a change is to be made," Scalia wrote, "we should get out of the business of implied private rights of action altogether." ◆

Contributing Editor Walter Olson (hambo@home.com), a senior fellow at the Manhattan Institute, wrote about harassment law in The Excuse Factory *(The Free Press).*

Congratulations to Marty Zupan, former Reason editor-in-chief, on 10 years of cultivating liberty as vice president of the Institute for Humane Studies

From your friends at Reason Foundation

Code War

By Mike Godwin

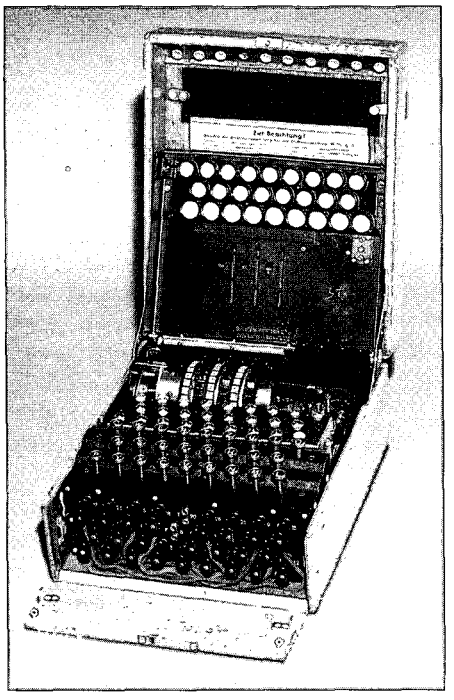
Cryptonomicon, by Neal Stephenson, New York: Avon, 928 pages, $27.50

No aficionado of trendy, complex contemporary novels by writers such as Thomas Pynchon or David Foster Wallace will be terribly surprised to come across a work of fiction that traces a single thematic thread running through the lives of a mathematical genius in World War II, his slightly less gifted but equally nerdy grandson in 1999, a gung-ho Marine driven by love and morphine, and a Japanese soldier transmuted by the bestial horrors of war. What may be surprising to readers of Neal Stephenson's *Cryptonomicon*, however, is that the author makes that thread cryptology—the science (or, more accurately, dual sciences) of encoding messages to keep them secret and extracting secret messages from other people's communications.

In a wide range of linked scenarios that tie WWII code breaking to the modern "cypherpunk" effort to create a currency and an economic system beyond governmental control, Stephenson's novel continually demonstrates that there's something essentially human about the process of encoding and decoding messages. It's this thesis that makes *Cryptonomicon* far more than simply an enjoyable, exceedingly well-written, encyclopedic, and deeply comic novel. It is, in fact, an important book that illuminates a critical public issue of our era: whether the power of encryption tools for cryptography can be trusted to individuals—tools that have, for instance, the potential to make wiretaps a thing of the past.

Cryptonomicon presents the reader with several entwined narratives, switching among them on a chapter-by-chapter basis. Most of the sections are set in World War II and follow the adventures of two men: mathematical prodigy and Army officer Lawrence Waterhouse and his near-antithesis, man of action and Marine sergeant Bobby Shaftoe. Both of these characters manage to complete grand tours of the European and Pacific theaters, but, more important, both demonstrate in their respective ways the human capacity to extract meanings from the chaotic and mysterious situations generated by a world war.

For Waterhouse, whose life is dominated by his gift for mathematical reasoning, the primary challenge is to crack Axis codes (and, secondarily, to conceal from the enemy the fact that the codes have been cracked). For the less-cerebral Shaftoe, an occasional morphine addict, the goal is more basic. Though his official mission is to assist in concealing Allied code-breaking efforts, he labors to return to the Japanese-occupied Philippines to rescue his paramour and the child he may have fathered with her. Where Waterhouse reflexively resorts to mathematical models to characterize his experiences, Shaftoe turns to poetic ones—during his time in the Far East he's learned to compose haiku. Through Shaftoe—whose individual story begins and ends with haiku—Stephenson suggests the broad application of cryptography in human life. The haiku poet, after all, encodes a deep moment of experience into three short strings of words. Similarly, it takes an experienced reader of haiku to decode such a poem.



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The Enigma Machine: *Cryptonomicon* continually demonstrates that there's something essentially human about the process of encoding and decoding messages.

Along with the World War II narratives is a present-day story centered on Waterhouse's grandson, Randy, a computer nerd whose own genius remains unrealized until it is unlocked by a unique business opportunity. Randy is invited by a friend to take part in a cryptographically facilitated offshore "data haven" that will become the technological platform for a totally Internet-based economic system. Backing that digital monetary system will require real-world gold. Working with Shaftoe's son and granddaughter, Randy may have a source for that gold: the code-breaking efforts of his grandfather, who 50 years ago may have uncovered a Nazi plot to collect and horde German and Japanese gold bullion.

You'd think such a web of narratives would be hard to follow. Certainly, it's difficult to summarize. But Stephenson, whose science-fiction novels *Snow Crash* (1992) and *The Diamond Age* (1995) have been critical and commercial successes despite difficult plotting, has made a quantum jump here as a writer. In addition to his bravura style and interesting authorial choices (Stephenson tells each of his narratives in the present tense, regardless of when they occur chronologically), the book is so tightly plotted that you never lose the thread.

But Stephenson is not an author who's content just to tell good stories. Throughout the book, he takes on the task of explaining the relatively abstruse technical disciplines surrounding cryptology, almost

always in ways that a reasonably intelligent educated adult can understand. As I read the book I marked in the margins where Stephenson found opportunities to explain the number theory that underlies modern cryptography; "traffic analysis" (deriving military intelligence from where and when messages are sent and received, without actually decoding them); steganography (hiding secret messages within other, non-secret communications); the electronics of computer monitors (and the security problems created by those monitors); the advantages to Unix-like operating systems compared to Windows or the Mac OS; the theory of monetary systems; and the strategies behind high-tech business litigation. Stephenson assumes that his readers are capable of learning the complex underpinnings of modern technological life. For the most part he's correct, although some otherwise intelligent readers may find a few of the mathematical discussions tough sledding.

Stephenson's technical virtuosity is supplemented by his extensive erudition—one finds allusions ranging from David Kahn's famous history of cryptology, *The Codebreakers*, to World War II narratives like *The Man Who Never Was*, *Das Boot*, and *Guadalcanal Diary*. And his scenes are populated with characters who could just as easily have stepped out of P.G. Wodehouse as out of James Jones, with guest appearances by real-world figures such as Alan Turing, Ronald Reagan, and Douglas MacArthur. There's even a set piece about the death of Admiral Yamamoto that could stand alone as a short story.

The result is a book that is readable, funny, humane, literary, and technically sophisticated (in every sense). But as I suggested at the outset, it is far more than a good read. It is vitally engaged with debates central to a world in which access to and control of information, data, and messaging is increasingly important. Stephenson forces readers to see cryptography (the creation of ciphertexts) and cryptanalysis (the decoding of such texts)—as something that's not only comprehensible by ordinary people but also something that each of us is, in some sense, born to do. To that end, he quotes Alan Turing, England's master codebreaker and the father of modern computing, at the very beginning of the book: "There is a remarkably close parallel between the problems of the physicist and those of the cryptographer. The system on which a message is enciphered corresponds to the laws of the universe, the intercepted messages to the evidence available, the keys for a day or a message to important constants which have yet to be determined. The correspondence is very close, but the subject matter of cryptography is very easily dealt with by discrete machinery, physics not so easily."

In short, the task of making sense of the universe—a task that, on some level or other, is one that each of us must face—is very much like a decoding problem. We have to figure out what is meaningful or true based on the inherently limited and untrustworthy evidence that the real world provides. And one finds this theme sounded again and again—especially when one of the Waterhouse males has to deal with the opposite sex (which turns out to be a very special kind of cryptanalytic problem for each of them). This idea applies even to the novel's title: In the book's fictive world, *Cryptonomicon* is the name given to a collection of scholarly works, compiled over centuries, that focus on the problems of cryptanalysis. In an analogous way, Stephenson's novel is itself a collection of individual stories that each provide a way into understanding the larger story of the crucial role that cryptology has played in shaping the culture we live in now.

What happens when you establish a monetary system that does not depend on government and that does not lend itself easily to government tracking and supervision?

That role is underscored early in the novel when Lawrence Waterhouse first joins the cryptanalytic team at England's Bletchley Park: "Some information comes into Waterhouse's eyes at least: on the other side of that window, men are gathered around a machine. Most of them are wearing civilian clothes, and they have been too busy, for too long, to trifle much with combs and razors and shoe polish. The men are intensely focused upon their work, which all has to do with this large machine. The machine consists of a large framework of square steel tubing, like a bedstead set up on one end. Metal drums with the diameter of dinner plates, an inch or so thick, are mounted at several locations on this framework. Paper tape has been threaded into a bewilderingly loopy trajectory from drum to drum. It looks as if a dozen yards of tape are required to thread the machine."

This is it in a nutshell: The confluence of the beginnings of modern decoding, computing, and disheveled hacker culture—it's a short step from Bletchley Park to the personal computer, now a fixture of everyday life in the industrialized world. And from PCs it's a short step back to cryptology, since cheap computing makes it possible for everyone to do cryptography more crack-proof than the most powerful encryption that governments could do half a century ago. This is, of course, a development that has troubled governments everywhere, and the United States government in particular. Thanks to some pioneering work done by American cryptographers only a couple of decades ago, the knowledge and techniques necessary for encoding or scrambling the things you write or say are no longer the sole preserve of government intelligence agencies; in fact, they are easily reproduced and implemented and available at low prices to most Americans today.

In a world full of governments that have grown accustomed—even comfortable—in their ability to keep track of their citizens, and to gather evidence about them when necessary, these developments are disorienting. What happens in a world where one cannot guarantee that a working wiretap will recover anything useful because the message traffic on the phone in question is encrypted? What happens when the perpetrator of a criminal threat can easily disappear from an online environment because no one has the information necessary to track or identify him? The question raised by the subplot of *Cryptonomicon* set in 1999 is even more troubling: What happens when you establish a monetary system that does not de-

pend on government and that does not lend itself easily to government tracking and supervision? (The novel's short answer is large-scale money laundering, among other things—no wonder the international criminal underworld evinces a deep interest in Randy Waterhouse's "data haven" project.)

For these reasons, our real-world government has been fighting a war against the spread of cryptographic tools. That war has been largely unpublicized, in part because the general public has yet to deem cryptography policy a matter of central concern. There is no groundswell of public support for keeping encryption technologies available to everybody, nor any anti-encryption-control group the equivalent of the National Rifle Association. Civil-liberties groups like the Electronic Privacy Information Center and the ACLU are fighting the Department of Justice and the National Security Agency over this issue, but it's a pretty lonely fight. The U.S. government has been sufficiently successful in suppressing the spread of encryption technologies both at home and abroad that the kinds of protections we should have—such as transparent encoding and decoding of e-mail in transmission or truly secure cell phones—are still in the future for most of us.

Why have civil libertarians so often found cryptography issues a tough sell? The problem is that for most people the subject seems awfully esoteric—codes and ciphers are what spies do, and are out of the range of concerns for ordinary people. *Cryptonomicon* challenges that notion by demonstrating in countless contexts not only how good human beings are at decoding and encoding their environments but also how *instinctive* that process is. We can't help functioning as cryptographers and cryptoanalysts because, at bottom, that is what we as human beings *do*. Which means that our government's current obsession with suppressing the spread of cryptographic information and tools is really a kind of suppression of human nature—and history tells us that any such effort at suppressing something that *everybody* does is invariably futile over the long run.

Will *Cryptonomicon* turn the tide of public opinion about cryptography or inform the political will to challenge the government's anti-cryptography policies? On the one hand, it's hard to believe that a 900-page novel of any sort could change the political landscape in an era in which the novel is an increasingly marginal mass-media form. Still, this book is compulsively readable, and word of how good it is has flooded throughout the Internet and into our literary culture. *Cryptonomicon* has already found its way onto *The New York Times* bestseller list (it made it to Amazon's top 100 even before publication). Whether the book will help trigger a sea change in the cultural dialogue about cryptological issues remains to be seen, but I for one am pretty hopeful about the prospect. ◆

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Polling Alone

By Jesse Walker

The Ladd Report, by Everett Carll Ladd, New York: The Free Press, 210 pages, $25.00

In 1995, Harvard political scientist Robert Putnam unleashed an unfortunate phrase on the country: "bowling alone." Writing in the *Journal of Democracy*, Putnam noted the thinning ranks of the Elks, the PTA, the League of Women Voters, and the like; from that evidence he concluded that America's civic sector had started to atrophy. Among the groups withering were the nation's bowling leagues, even as the total number of bowlers was going up. From this he conjured his famous phrase, with its faint connotations of onanism and Oswald.

Thus began the civil society mania of the mid-'90s, led by pundits and politicians apparently convinced that because they didn't know their neighbors' names, the unwashed masses must be in even worse shape. In a follow-up article, published in the Winter 1996 *American Prospect*, Putnam declared that the "strange disappearance of social capital and civic engagement in America" was a "difficult mystery." Social capital, he explained, was those "features of social life—networks, norms, and trust—that enable participants to act together more effectively to pursue

ARCHIVE PHOTOS

Better Than Bowling?: U.S. Youth Soccer engages more than 2 million boys and girls, plus an army of adult volunteers.

shared objectives." Civic engagement meant "people's connections with the life of their communities, not only with politics."

Not one to shy from a mystery, Putnam gathered the suspects together, Poirot-style, and considered each potential culprit in turn. Was the welfare state to blame? Rootlessness? Work? Putnam's essay had no Agatha Christie climax; he could not with certainty lay all the guilt at one evildoer's shoes. But he had a theory. Americans were less engaged with their communities, he suggested, because they were befogged by TV.

Now Everett Carll Ladd, the executive director of the Roper Center for Public Opinion Research, has offered a different answer. In *The Ladd Report*, a thoroughgoing collection of data on American life, he argues that social capital and civic engagement never really withered at all. They may have disappeared from the clumsy maps with which Putnam and the punditry examine the country, but they never disappeared from the country itself.

Ladd stresses that his book is not a direct response to Putnam's essays, that Putnam is simply "one among many voices making similar claims." But all those voices make the same mistake: They all assume that, because one set of institutions is declining, no other groups are picking up the slack. Bad assumption. "In case after case where a group that's been important in the past now finds itself losing ground, or at least struggling to maintain its place, investigation shows that the main cause is simply strong competition," writes Ladd. For example: "The Elks and the Boy Scouts are less prominent and active now than they were half a century ago, but the Sierra Club is much more so. Bowling leagues are down, but U.S. Youth Soccer has emerged *de novo* and engages more than two million boys and girls, together with an army of adult volunteers."

Those might not be the best examples in the world, at least for those of us who often differ with the Sierra Club and prefer bowling to soccer. But then, property-rights groups are also growing (a trend Ladd ignores), and it's not as though soccer has supplanted bowling. More people are bowling than ever before, and if they aren't doing it in leagues, that hardly means, contra Putnam, that they're "alone." They bowl in informal groups, with family and friends, and there's no reason to assume they're any less engaged for it.

Nor are we exchanging our concrete attachments for membership in "paper" organizations. Here too, Ladd breaks with Putnam, who claimed that groups like the Sierra Club may have long membership rolls but offer few opportunities for face-to-face contact. "For the vast majority of their members," Putnam wrote, "the only act of membership consists in writing checks for dues or perhaps occasionally reading a newsletter....The bond between any two members of the Sierra Club is less like the bond between two members of a gardening club and more like the bond between any two Red Sox fans (or perhaps any two devoted Honda owners)."

"In case after case where a group that's been important in the past now finds itself losing ground, or at least struggling to maintain its place, investigation shows that the main cause is simply strong competition," writes pollster Everett Carll Ladd.

Against this, Ladd offers the words of survey analyst George Pettinico: "In fact, a closer examination of the green movement in the United States reveals a vibrant, grassroots culture involving countless individuals who are actively engaged in their communities. On almost a daily basis, a plethora of meetings, social gatherings, hikes, bike trips, clean-up projects, rallies, nature workshops and the like are held in communities across the nation by local chapters of national environmental organizations, as well as ad hoc community groups." That's more than can be said for most American labor unions, yet the decline in union membership is, for Putnam, evidence of social disengagement.

Often, the new groups are more tightly rooted in their communities. The PTA's membership has indeed fallen since its early-'60s high (though it has actually been increasing, albeit slowly, since 1982). But membership in *local* parent-teacher groups has sharply increased. Some of the new groups were once chapters of the national PTA but seceded, usually so they might keep a greater portion of their dues for local use.

Not only are more people joining groups, but they're joining more groups per person: The "density" of association is increasing. Face-to-face interaction is still strong, with a record proportion of the country volunteering. But people are opening their wallets and signing their names as well: Even adjusted for inflation, charitable giving nearly tripled from 1960 to 1995.

The churches, too, are thriving. The mainline faiths are losing members—a result, one suspects, of excessive bureaucracy and changing times. But new institutions, from tiny worship centers to "megachurches," have more than filled the gaps. Not everyone is enamored with the superchurches' shopping-mall/rock-show ethos; as Ladd admits, "some of it is undoubtedly both crass and superficial." But even if you hate everything about the new temples, or the old ones for that matter, you must admit that they're a telling argument against Putnamism: "little of it fits a picture of Americans retreating into more solitary pursuits, finding their cultural substance primarily through the tube."

On one level, the very idea of measuring civic engagement is ridiculous. There is no simple index of sociability. There isn't even a complex one. Community spirit is intangible, and therefore unmeasurable in any but the most indirect, unsatisfying ways. Metrics can be misleading: Some numbers obscure more than they illuminate.

In Ann Arbor, Michigan, where I went to college, it was a cliché to complain that campus life was more active and interesting at some point in the past, usually whichever year the complainer was 20. I was often told that in the good old 1970s, there were eight local film co-ops to choose from, each showing its own series of old or obscure movies. In the late '80s, by contrast, there were only two.

It never occurred to those nostalgic

cinephiles that the diversity of movies available had actually increased, thanks to home video. Putnam might object that the video generation is *watching alone*, but that's not necessarily true: My housemates and I held a public movie night every week, in which our friends (and their friends, and a few folks no one recognized) could enjoy our weird film tastes in an environment far more sociable and interactive than that offered by the co-ops. Many other households did the same thing. And when we preferred to see a picture on a big screen—well, there were always those two remaining film societies.

On a national scale, the measurement problem gets worse: Neither anecdotal nor statistical evidence seems capable of creating a complete map of community life, especially since the civil society that really counts takes place on a level so local as to be almost invisible to outsiders. Changes, too, can be hard to observe; when an institution fades, it's not always obvious where to look for its successors. The best Ladd can do is gather all the relevant evidence he can: telephone surveys, membership rolls, census reports, government files. The result is a wall of data, and if it's patchier than one might prefer, it's still pretty overwhelming—not a knock-down argument, but an impressive stack of counterevidence nonetheless.

There are, however, a few holes in Ladd's analysis—places where, unmoored from the data, he starts to get a little too speculative for his own good. I'm not nearly as sure as he is that it's "easier to be an engaged citizen in the Information Economy than in an Industrial Economy," partly because I'm suspicious of such sweeping categories and partly because his basic argument—that industrial jobs leave less time for civic life—forgets that routine, labor-intensive work is hardly limited to rust-belt factories. Nor is his defense of American exceptionalism very convincing, mostly because he essentially redefines it as the belief that there is anything at all distinctive about American history and culture.

Ladd's section on "social trust" is especially disappointing. Against Putnam's citation of a survey showing that Americans have less faith in each other, Ladd simply posits a poll that came to different conclusions. And he buries that datum in a chapter on Americans' trust in social institutions, swamping us with information that may be interesting but doesn't really address the issue.

Despite all that, *The Ladd Report* is enough to change the terms of the debate, to force the civil socialites to consider more than the declining fortunes of a few fetishized institutions. The issue now is not why civil society is dissolving, but why it's changing—and why so many people have been so quick to assume it's simply fading away.

In some libertarian quarters, the alleged decline of community was read as a sign that the state was crowding out voluntary associations. Why, the argument went, would people affiliate for mutual gain if the same advantages could be had through the state? Ladd's reply is that democratic governments are different from totalitarian states. The latter have to make war on independent institutions. The former, he claims, do not.

This isn't much of a reply, if only because so many democratic governments *have* made war on any association that stands in the way of public policy. "Urban renewal" and "redevelopment" schemes, for instance, have wiped out entire neighborhoods, and with them the little civic ties that kept those places alive. Cops and principals across America have targeted teenage subcultures, harassing kids in goth makeup or trench coats out of misplaced fear that their chosen means of mutual engagement will lead them to mass murder. And anyone who thinks it takes a totalitarian to crush a community group hasn't paid much attention to the nation's zoning boards, whose inflexible rules have often made it impossible for neighborhood churches, among other groups, to set down roots.

The mechanistic argument against the welfare state—the idea that every dollar the government spends reduces Americans' ability to cooperate on their own—is insulting and wrong. But it's also true, as Ladd admits, that when nonprofit groups get hooked on government grants, they tend to lose both their independence and their roots in the communities they're supposed to serve, adopting a more centralized and "professional" style. This has happened to charities, to art centers, to community radio stations; it may be a reason why several of the groups Putnam tracks are in decline. (The same fate, of course, can befall groups that depend on private foundations. Conversely, many civic groups have enjoyed close relations with ultra-local levels of government without losing their civic base.)

A better answer is simply that people are creative and sociable, that affiliation is in our nature, and—thank goodness—that we don't take our cues from Washington. Who'd have guessed it? It turns out that we don't need any brow-furling pundit-talk about "civil society" to keep civil society alive.

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Hear Her Roar

by Cathy Young

Feminist Interpretations of Ayn Rand, edited by Mimi Reisel Gladstein and Chris Matthew Sciabarra, University Park, Pennsylvania: Pennsylvania State University Press, 413 pages, $60.00, $19.95 (paper)

In Ayn Rand's lifetime, university professors regarded their students' interest in her writings with a mixture of scorn and dismay. Seventeen years after her death, the iconoclastic novelist-philosopher is becoming a respectable subject of scholarship. Most recently, a collection of essays on Rand has appeared in the "Re-Reading the Canon" series featuring feminist analyses of philosophers from Aristotle to Foucault.

That work, *Feminist Interpretations of Ayn Rand*, edited by Mimi Reisel Gladstein and Chris Matthew Sciabarra (the authors, respectively, of *The Ayn Rand Companion* and *Ayn Rand: The Russian Radical*), could

***Fountainhead*, the Movie: Dominique's ravishment is an extreme expression of Rand's general view of sex as involving male dominance and female submission.**

not have pleased Rand, given her aversion to anything called "feminist." To some extent, this attitude reflected the anti-individualist, anti-capitalist slant of the modern women's movement. But it also had to do with Rand's peculiar views on sex and gender.

Was Rand a feminist? Some of the book's contributors—Gladstein, author Karen Michalson, psychologist and former Rand protégé and lover Nathaniel Branden, and, with some reservations, biographer Barbara Branden—place her squarely within feminism's best tradition, pointing both to her own life of achievement and to her female characters: independent, strong women ahead of their time. As Nathaniel Branden puts it, "A feminism that sees woman at her best, as a heroic figure, will find support and validation in Rand's writings. A feminism that defines woman as victim and man as her evil oppressor will see Rand as the enemy."

Other contributors, such as libertarian feminist Joan Kennedy Taylor, philosopher Diana Mertz Brickell, and writer Thomas Gramstad, are more ambivalent. They argue that Rand's work has much to offer feminism but is marred by what Gramstad calls "flaws and inconsistencies in her notions of gender." All agree that nothing in Rand's basic philosophy is incompatible with feminism and that, in fact, her antifeminism was in many ways at odds with her individualism.

One obvious stumbling block for would-be Randian feminists is the infamous "rape scene" between Howard Roark and Dominique Francon in Rand's novel *The Fountainhead.* Is it rape or, as Wendy McElroy insists, "rough sex between consenting adults"? McElroy rightly criticizes feminists who employ very broad definitions of sexual violence. Yet, given Dominique's ferocious resistance, the act would seem to qualify as rape even under the narrowest definition of the term (though her desire for degradation at Roark's hands does complicate the situation). While McElroy needlessly blurs the lines between this episode and other Randian encounters that *can* be described as consensual rough sex, in some sense Dominique's ravishment is an extreme expression of Rand's general view of sex as involving male dominance and female submission.

McElroy asserts that this emphasis on female surrender to the male "on the altar of sex" is the only thing that "mitigates an otherwise stable state of equality between the man and the woman" in Rand's novels. But it may be more complicated than that.

Rand believed, of course, that men and women should have equal rights. She had little sympathy for the traditional ideal of womanhood, in which the morality of self-sacrifice and service to others that she so detested was distilled and magnified. In a 1964 interview, she affirmed that women, like men, should build their lives around work: "What is proper for a man is proper for a woman....There is no particular work which is specifically feminine." Her novels reflect that: Kira Argounova in *We the Living* and Dagny Taggart in *Atlas Shrugged* both choose "unfeminine" careers, engineering and railroad operations.

In "Who Is Dagny Taggart?" Michalson sees Dagny as a nearly unique female "epic hero" in Western literature. Particularly provocative is her analysis of the scene in which a teenage Dagny half-jokingly tells her future lover Francisco d'Anconia that perhaps she should play dumb in school to gain popularity. Francisco slaps her face, causing her "violent pleasure." Is Dagny "an oppressed woman reveling in her own abuse"? Michalson persuasively argues that the episode subverts the traditional paradigm in which men use violence "to keep women from excelling [or] being too uppity" (though I'm less inclined to agree that the subversion was intentional). Francisco slaps Dagny for threatening (even facetiously) to lower her standards, and her pleasure comes from realizing how intensely he values her achievement. Dagny, Michalson observes, is "the only important female hero in Western literature who is physically struck for refusing to excel at a nontraditional pursuit."

Michalson is undoubtedly right when she asserts that if most feminists wouldn't dream of embracing Dagny or her creator as role models, it's mainly because "some major strains of feminism posit themselves against individual achievement and traditional ideas of heroism, which are defined as 'male.'" Yet the case for Rand as crypto-feminist involves a good deal of wishful thinking and logical acrobatics.

Take Michalson's reading of Rand's statement, from the 1968 article "About a Woman President," that "a properly feminine woman does not treat men as if she were their pal, sister, mother—or *leader*" (emphasis in original). What this statement means, Michalson contends, is that a real woman does not define herself "in relation to men" but is "self-actualized and self-defined." Nice try, but unfortunately Rand was very specific about women's proper role in relation to men: "the essence of femininity is hero worship—the desire to look up to man." Indeed, the point of Rand's article was that it would be "meta-

physically inappropriate" for a woman to become president—not because women were less qualified for the office but because it was inherently unfeminine. For a woman to be "the superior, the leader, virtually the *ruler* of all the men she deals with," Rand wrote, would be such "psychological torture" that any woman who would seek the job would clearly be too irrational to be fit for it.

Man-worship, Rand hastens to add, does not mean "dependence, obedience, or anything implying inferiority" but only "intense admiration." However, in an essay pointedly titled "Ayn Rand: The Woman Who Would *Not* Be President," anthropologist Susan Love Brown shows that these protestations are disingenuous, given Rand's assumption that a female president couldn't "worship" a man because she would be superior to all men in status and power. Leaving aside Rand's rather bizarre concept of the presidency, "About a Woman President" undercuts the claim that Rand's belief in male sexual dominance had no implications outside the bedroom.

Brown, who seems more critical of Rand than any other original contributor to the book, also takes a less sanguine view of the feminist element in *Atlas Shrugged*, pointing out that Dagny is not quite the equal of the novel's male heroes: She is not a "prime mover" and does not "originate thought," and even her work is more practical than creative. (French linguist Valerie Loiret-Prunet argues that Rand's most "feminist" heroine is Kira, who is morally and intellectually superior to both of the male protagonists in *We the Living* and is truly the center of the novel.) Notably, when Rand declared that her primary goal as a writer was "the projection of an ideal man"—*The Fountainhead*'s Roark, *Atlas Shrugged*'s John Galt, etc.—Dagny and Kira were conspicuously missing from the list.

To suggest that Rand tended to see women as the "second sex" may seem shocking. Yet she herself said as much: "Men are metaphysically the dominant sex"; "an ideal woman is a man-worshiper, and an ideal man is the highest symbol of mankind." As Gramstad observes, Rand's beliefs about gender contradict her general philosophy in several ways. Her notion of femininity clashes with the ideal of self-sufficiency, since "hero worship requires *another*, one who is the object and recipient of worship" (though, to be fair, Rand believed that a woman had to be a strong person in her own right to be worthy of the hero she worships). Gender-based rules also conflict with individualism and with Rand's view of the human being as "a being of self-made soul."

Gramstad offers a rousing "Randian-feminist synthesis" in which the heroic individualist potential of Rand's philosophy is fully extended to women. Like Brown and some other contributors, however, he is much too uncritical of the feminist dogma that all psychological differences between the sexes are social in origin, and much too inclined to dismiss biological theories of difference by citing ideologically driven critiques. (One welcome exception is Brickell, who acknowledges that "there may well be significant innate differences between males and females" but stresses that these general patterns should not translate into "normative prescriptions" for individuals.)

To suggest that Rand saw women as the "second sex" seems shocking. Yet she herself said as much: "Men are metaphysically the dominant sex"; "an ideal woman is a man-worshiper, and an ideal man is the highest symbol of mankind."

At the other extreme, Robert Sheaffer, the author of *Resentment Against Achievement*, chastises "neo-Randians" who repudiate Rand's opinions on sex roles for buying into "simplistic and unsound victim-feminist positions, which depict male dominance in entirely negative terms." But, while Sheaffer affirms that "Rand's views on the positive aspects of male dominance deserve...as much respect as her writings on other subjects," he seems to agree with Rand's feminist critics that her thinking on sex and gender is riddled with

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inconsistencies. And he is dismissive of one of her core beliefs: that sexual attraction is based on rational values and that a heroic man must pursue a strong, heroic woman whose "surrender" will give him a sense of accomplishment. Sheaffer argues that this theory was literally a rationalization of Rand's more fundamental Dionysian view of sexuality, expressed in the violence of her sex scenes.

In his most interesting argument, Sheaffer challenges Rand's assumption that her paradigm of femininity as the worship of a superior man would not preclude women from achieving any position except the presidency (which, Sheaffer astutely notes, Rand saw less in real-life terms than as a symbolic pinnacle of authority and accomplishment). In fact, it cripples the romantic options of any high-achieving woman, greatly narrowing the range of men she can "look up to," so that "female heterosexuality and female achievement seem to be inherently antithetical." Sheaffer thinks Rand was on to an important truth, even if she didn't quite know it herself.

Next to anodyne pieties about "gender as human-made," Sheaffer's candid belief that male dominance is the natural way of things is perversely refreshing. Yet taking his argument to its logical end, one must conclude that Randian philosophy puts women in an impossible bind: They are forced to choose between achievement, which Rand regards as the supreme human value, and heterosexual femininity, which she regards as the supreme female value. In that case, one might even argue that women would be better served by cultural conservatism, which does not place so absolute a premium on achievement and treats the traditional feminine sphere with more respect.

The alternative is to allow that, while the tension between female heterosexuality and achievement can be real, it may not be nearly as universal or inevitable as Sheaffer believes. Quite a few high-achieving women, notably Margaret Thatcher (one has to wonder what Rand thought of her), seem to have been happy with unheroic men. Rand herself had a gentle, passive, "nurturing" husband. Sheaffer is undoubtedly right that her husband's lack of heroism was a disappointment to her; yet when she pursued an affair, it was with a younger man to whom she was a mentor and idol. Perhaps it was the image, not the reality, of male dominance that Rand craved.

Was this view of relationships in some ways a reflection of prevailing cultural norms? Sheaffer pooh-poohs this idea, pointing out that Rand was willing to defy many other widely held values. But the most daring rebel can have a conformist side. According to Brown's compelling analysis, which relies on biographical information as well as Rand's work, Rand did imbibe the notion that intellect, ambition, and strength were male attributes; thus, her possession of these traits made her insecure about her femininity. Exaggerated "man worship" was a way to reaffirm it. Ironically, this allowed her to create a vision of heroic womanhood.

Too often, Rand is either revered as a prophet or dismissed as a crank. *Feminist Interpretations of Ayn Rand* approaches her as a writer and thinker of profound insights and equally profound contradictions, who offered an important and inspiring but flawed and limited vision of life. These contradictions and limitations are perhaps nowhere more evident than in her views on women—for whom, perhaps, her message of healthy selfishness was especially valuable.

To Rand herself, such treatment might have seemed more insulting than outright dismissal, and many orthodox Randians will no doubt take the same attitude. But only such a serious approach can ultimately end Rand's intellectual marginalization. This volume takes a major step in that direction. In the process, it addresses issues of sexual equality and difference that are more relevant than ever today.

Contributing Editor Cathy Young (cathyyoung1@compuserve.com) is the author of Ceasefire!: Why Women and Men Must Join Forces to Achieve True Equality *(The Free Press).*

Nazi Economics

By Michael McMenamin

Hitler, 1889–1936: Hubris, by Ian Kershaw, New York: W.W. Norton & Co., 845 pages, $35.00

Adolf Hitler was "wholly ignorant" of economics, Ian Kershaw boldly writes in his excellent new study, *Hitler, 1889–1936: Hubris.* What the dictator did know was politics and how to achieve public support—Hitler was an immensely popular leader with approval ratings even Bill Clinton would envy—and early on, he made it clear that economics would be subordinate to politics.

One odd result of Hitler's decision is that few of his biographers have paid much attention to his economic policies prior to the Nazis' first overt military act, the reoccupation of the Rhineland in 1936. Indeed, if they pay any attention at all to the subject, most merely accept Nazi propaganda claims of Hitler's "economic miracle" in restoring Germany's prosperity. Kershaw's book is a welcome exception to this tendency.

The general view that Germany's shattered economy surged to life in the first few years of the Nazi regime is typified by Sebastian Haffner, a German writer whose short book *The Meaning of Hitler* (1979) received extravagant praise in John Lukacs' recent *The Hitler of History.* As Haffner put it, "Among these positive achievements of Hitler the one outshining all others was his economic miracle....In January 1933, when Hitler became Reich Chancellor, there were six million unemployed in Germany. A mere three years later, in 1936, there was full employment. Crying need and mass hardship had generally turned into modest but comfortable prosperity.

"Almost equally important: helplessness and hopelessness had given way to confidence and self-assurance. Even more miraculous was the fact that the transition from depression to economic boom had been accomplished without inflation, at totally stable wages and prices. Not even Ludwig Erhard succeeded in doing that

later in post-war Western Germany."

Haffner is hardly alone in his glowing evaluation of Hitler's supposed economic miracle. In his highly influential *Origins of the Second World War* (1961), British historian A.J.P. Taylor similarly gave the Nazis credit for creating widespread prosperity, concluding, "The Nazi secret was not armament production; it was freedom from the then orthodox principles of economics. Government spending provided all the happy effects of mild inflation; while political dictatorship, with its destruction of trade unions and rigorous exchange control, prevented such unfortunate consequences as a rise in wages, or in prices."

Kershaw's version of things more accurately reflects what was really happening in Germany from 1933 through 1935. Hitler's economic policies were systematically wrecking the German economy and were rapidly painting him into a corner where his only choices were war or a loss of power.

Hitler, argues Kershaw, was deathly afraid of inflation and a repetition of the early 1920s. Nevertheless, he had to reduce unemployment or he wasn't going to last long enough to begin rearming Germany, a public goal of his since the '20s. Increasing exports was not a possibility since, unless the German government devalued the mark (as Britain had done with the pound and the United States with the dollar), German exports couldn't compete in a way that would add new jobs or bring needed foreign exchange. Hitler nixed devaluation because he thought it was a step on the road to inflation. Tax cuts were also out of the question because he believed they led to less revenue not more growth.

Hitler's solution for both the rearmament and unemployment problems was the same: massive deficit spending. In fact, by Kershaw's account, the Nazi government guaranteed some 35 billion ReichMarks to the German armed forces alone over an eight-year period, along with massive road building, subsidies to the auto industry, lots more bureaucrats to enforce all the new controls and regulations, and bribes to women to get married and stop working.

Did such policies reduce unemployment from 6 million in 1933 to 1 million three years later? Not exactly. Statistics from Dan Silverman's *Hitler's Economy* (1998) show that unemployment was reduced in Germany from 34 percent or about 6 million people, in January 1933, to 14 percent, or 2.5 million people, in January 1936. That's a dramatic reduction, to be sure, but hardly full employment. Even the 2.5 million number is extremely unreliable, as Stephen Roberts, an economic historian at Australia's University of Sydney who lived in Germany in the mid-'30s, explained in his 1937 work, *The House That Hitler Built.*

The "official statistics naturally tell only part of the story," wrote Roberts. "They do not take into account the Marxians, Socialists, Jews and pacifists who have lost their jobs and are cut off from relief; such persons do not appear in the official figures of unemployment. The refugees are ignored. In addition, at least a million people have been absorbed in the army, the labour-service camps, the Nazi organizations, and various partly-paid forms of labour on public works. Half a million women have been taken off the labour market in the last four years by means of the marriage allowance paid by the Government to entice them away....What they have done has been to introduce a series of emergency steps which have drastically reduced the number of unemployed; but such steps, by their very nature, are in many cases temporary. On the other hand, the reduction [in unemployment], however artificially it may have been achieved, has had a tremendous propaganda value for the Government, and there is the fixed belief of most Germans today that Hitler has achieved wonders in providing employment."

The conventional wisdom credits Hitler with an economic miracle. Ian Kershaw's account more accurately reflects what was happening in Germany from 1933 through 1935. Hitler's policies were wrecking the economy.

Hitler paid for his economic "miracle" partly by depleting his nation's gold reserves, which he used to import critical raw materials for the manufacture of weapons. When he took office, the Reichbank had reserves totaling 937 million ReichMarks; four years later, that figure was down to only 72 million ReichMarks. Massive government borrowing financed the rest of the government-driven economy. As Roberts put it, "The Nazi state is being financed by short-term [90 day] loans—up to 15 billion Reichmarks by the end of 1936....In short, Germany is going round and round. She can get nowhere until she returns to normal economic conditions, but she is afraid to try and get back to those, because she fears economic collapse and social upheaval if she does so."

Kershaw makes the same point and suggests that it was this fear of social unrest, heightened by serious food shortages in Germany during the fall of 1935—themselves largely the result of government policies—that played the major role in Hitler's decision to reoccupy the Rhineland in March 1936. Keep in mind that Hitler's reoccupation of the Rhineland was considered one of his "brilliant" strokes precisely because it was so unexpected—Germany was unprepared militarily or economically to carry out any extended effort in support of what even Hitler conceded to intimates was nothing more than a bold bluff.

Conventional wisdom holds that Hitler moved on the Rhineland when he did because the world was distracted by Mussolini's invasion of Abyssinia. Kershaw allows that motive as a contributing factor but contends that turmoil in Germany occasioned by the food shortages is the real key to the timing of such a risky initiative. Indeed, he argues that Hitler invaded precisely because he knew it would be extraordinarily popular within Germany and divert public attention from his domestic difficulties.

Contrary to A.J.P. Taylor, by late 1935 Germany was experiencing anything but the "happy effects of mild inflation" and "freedom from orthodox principles of economics." As Kershaw writes, "A summary of price and wage levels prepared for Hitler

Adolf Hitler in 1934: To counteract the effects of his economic policies and get raw materials for arms, he embarked on foreign conquests.

on 4 September 1935 showed almost half of the German work-force earning gross wages of 18 ReichMarks or less per week. This was substantially below the poverty line...Wages, then, remained at the 1932 level—substantially lower than the last pre-Depression year of 1928 in the much-maligned Weimar Republic. Food prices, on the other hand, had risen officially by 8 per cent since 1933. Overall living costs were higher by 5.4 per cent. Official rates did not, however, tell the whole tale. Increases of 33, 50, and even 150 per cent had been reported for some foodstuffs. By late summer, the terms 'food crisis' and 'provisions crisis' were in common use."

These facts were well known at the time, both within and without Germany. Roberts and others had written about them, attributing the food shortages to Hitler's centralized agricultural policy, which had virtually eliminated food imports while implementing government controls. The predictable result: Germany produced less food, causing both shortages and price increases. According to Roberts, wheat went up 15 percent, eggs 50 percent, butter 40 percent, potatoes 75 percent, and most meat 50 percent—all despite "official" and ineffectual price controls which Hitler for appearances' sake refused to lift. Well into Hitler's "miracle," Kershaw notes, "poor living-standards, falling real wages, and steep price increases in some necessities...[were] the dismal reality behind the 'fine facade of the Third Reich.'"

At the same time, a ferocious economic policy battle was being waged over foreign exchange reserves: Should they be used to buy food imports or raw materials for armament production, the latter being Hitler's primary purpose since he first took office? Hitler appointed Hermann Göring (who knew less about economics than Hitler) to mediate between Economics Minister Hjalmar Schacht, who wanted to purchase raw materials for armaments, and Agriculture Minister Walther Darre, who wanted food to cover up his failed policies. Schacht, a social friend of Göring's, expected a rubber stamp in favor of raw materials for arms. To everyone's surprise, except Hitler's, Göring chose food, an answer that set Germany on the road to foreign conquest.

As Kershaw sees it, Hitler gave priority to food imports because the "immediate prime need was to avoid the damaging psychological effects of the only alternative: food rationing." But this decision, in turn, adversely affected German rearmament. "By early 1936," says Kershaw, "available supplies of raw materials for rearmament had shrunk to a precariously low level. Only one to two month supplies were left. Schacht demanded a slow down in the pace of rearmament....As Hitler entered his fourth year as Chancellor, the economic situation posed a real threat to rearmament plans. At the very time when international developments encouraged the most rapid expansion possible, the food crisis—and the social unrest in its turn—was sharply applying the brakes to it....Any slow down in rearmament... would inevitably bring increased unemployment in its train...[Hitler] saw this as all the more reason to hasten expansion to gain 'living-space.'"

In other words, if Hitler had to spend foreign exchange reserves for food to keep the people happy, he would have to get the raw materials for armaments by taking them. Otherwise, there would be more unemployment when the arms workers were laid off due to a lack of raw materials. Hitler knew he couldn't survive both food shortages and a resurgence of unemployment.

Commenting in early 1937 on Göring's Four Year Plan for economic self-sufficiency, Roberts had presciently predicted the inevitability of either war or Hitler's fall from power. "There are 34 vital materials without which a nation cannot live, and unfortunately, Germany is worse off than any other great state insofar as these are concerned," he observed. "Whereas the British Empire is largely dependent on outside sources for only nine of these, Germany has only two in ample quantities—potash and coal. That means she must turn to the foreigner for all of her supplies of 26 of these and for part of six more. Yet this is the Power that sees fit to launch a plan for complete self sufficiency. It is ludicrous, unless she looks forward to obtaining control of the vast raw materials of central Europe or the lands beyond the Ukraine by some adventurous foreign policy....That is [Hitler's] basic dilemma. If he persists in the [economic] policies he has enunciated, he plunges Europe into war; if he abandons them, he can no longer maintain his position within Germany."

It's not that Hitler lacked contrary advice. Kershaw tells us that in October 1935 Price Commissioner Carl Goerdeler sent Hitler in October, 1935, "a devastating analysis of Germany's economic position."

According to Kershaw, Goerdeler "favored a return to market economy, a renewed emphasis upon exports, and a corresponding reduction in the rearmament drive—in his view at the root of the economic problems....If things carried on as they were, only a hand-to-mouth existence would be possible after January 1936." But Goerdeler was ignored and later dismissed. Instead, Germany reoccupied the Rhineland, to widespread popular acclaim, and Göring unveiled his Four Year Plan, putting the economy firmly on a war footing.

Hitler himself apparently never had a clue that the economic policies he had followed for the first three years of his regime were responsible for his production problems. By 1936, Kershaw makes clear, Hitler believed his own press clippings regarding his economic acumen. Thus, for Hitler, the food crisis only confirmed his preconceptions. In the secret memorandum on which Göring's Four Year Plan was based, Hitler wrote, "We are overpopulated and cannot feed ourselves from our own resources. The solution ultimately lies in extending the living space of our people, that is, in extending the sources of its raw materials and foodstuffs." That is, the problem is not my fault and the answer is war, not economic reform.

Hitler's fears of losing power were not without foundation. His great nemesis, the Soviet Union, found that out 50 years later. In the 1980s, it could not keep up with increased U.S. defense spending and sustain what William E. Odom in *The Collapse of the Soviet Military* (1998) terms "a permanent war economy" in which 20 to 40 percent of the gross domestic product went to the military. The Soviets faced the same choice as Hitler: economic reform or war? Thankfully, the Soviet leaders chose economic reform, even though it didn't save them or their regime. Freeing yourself from orthodox principles of economics can be a tricky thing.

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What is your Will?

The Wrong Rights

By Daniel Shapiro

A Life of One's Own: Individual Rights and the Welfare State by David Kelley, Washington, D.C.: The Cato Institute, 1998, 176 pages, $9.95

Serious alterations of the welfare state are no longer politically impossible. Welfare reform passed in 1996, and privatizing Social Security is a respectable idea. Still, as David Kelley points out in *A Life of One's Own*, the *legitimacy* of the welfare state remains largely intact. Few challenge the idea that it is the state's job to provide welfare for the poor and "social" insurance such as retirement pensions and health care for all its citizens. Kelley, the director of the Institute for Objectivist Studies, casts a critical eye upon the central claim that gives the welfare state its legitimacy—that there are basic, "positive" rights to things such as food, shelter, and health care which are on a moral par with the "negative" rights to life, liberty, and property.

How did such a claim become widely accepted? Welfare state proponents often claim that poverty and the economic risks inherent in a market economy require an activist state. Kelley rejects this argument. Poverty in the midst of rising living standards and economic risks were indeed problems, although far less than the pre-industrial problems of universal poverty and natural cycles of famine and disease. As important, people had begun addressing and solving such issues through voluntary actions—charities, insurance systems, and the like. Kelley argues that the reason for the adoption of the welfare state from the late 19th- to the mid-20th century was mainly intellectual, not economic, change.

Reformers successfully challenged and transformed the classical liberal concepts of rights that had emerged during the 17th and 18th centuries. Classical liberals had defined freedom as "negative": as the right to choose among options without threats of force and violence. In contrast, reformers argued that negative freedom could only be valuable if supplemented by a positive right to certain basic economic goods and a guaranteed range of options. Hence, reformers argued that benevolence and generosity were no longer values or virtues, to be exercised voluntarily. Instead, such traits became duties that the state discharged for us. The reformers rejected the emerging society of voluntary contract, where positive obligations were self-imposed, in favor of a model of community consisting of unchosen positive obligations to care for citizens who are unable or unwilling to care for themselves.

Kelley's main aim is to show that the arguments from positive freedom, benevolence, and community all fail. This is no simple task. At first glance, the positive freedom argument—that freedom requires many options, not just non-interference—is plausible. As Kelley acknowledges, a hard-and-fast line cannot always be drawn between not being prevented from choosing an option and the number of options one has. After all, any obstacle, restraint, or limitation can be viewed as something that *eliminates* an alternative or as something that *prevents* a person from choosing it. The argument from positive freedom asks us to see lack of an opportunity due to poverty or disability, say, as something that prevents someone from choosing that opportunity, and overt coercion as simply removing alternatives one would otherwise have.

Nevertheless, Kelley points out there are real differences between being prevented and lacking an opportunity. First, when an obstacle results from nature or reality, not other persons, it is "wishful thinking to regard it as an obstacle to what we otherwise would be free to do." Thus it makes little sense to say that being ill is a restriction on freedom, or that facts about economic reality (e.g., that income requires production), limit the freedom of those who wish to be idle. Second, lacking an opportunity can simply result from someone failing to provide a benefit, which is different from being deprived of something. For instance, if I want to marry a woman and she turns down my offer, her refusal hardly limits my freedom to marry; without her consent, my marrying her is not on my list of alternatives.

Failure to make these distinctions renders the concept of positive freedom so broad as to be meaningless. We end up with everyone being "coerced" all the time because reality and other people's choices always eliminate options. This point gets overlooked, Kelley says, because those who use the concept of positive freedom are rarely consistent. Economic pressures on the poor are described as economic coercion, but businesses losing money because of changes in consumer preference are rarely so described.

David Kelley argues that the poor are not helpless creatures and that achieving positive "freedom" through government action leads to a sacrifice of both real freedom and opportunity.

These points are fine as far as they go, but fortunately Kelley does not stop there. He argues that these conceptual disputes are really rooted in disagreements about the ordinary person's ability to succeed in the market, and whether expansion of state power should be viewed with alarm or solace. What really underlies the claim that the poor have no choice but to accept a lousy job, or the comparison between poor working conditions and slavery—common motifs in the positive freedom literature—is economic determinism, the notion that workers in free market capitalism are helpless victims of forces beyond their control and can be liberated through state power to provide economic goods. Thus, an equally important part of Kelley's argument is that the poor are not helpless creatures and that achieving positive "freedom" through government action leads to a sacrifice of both real freedom *and* opportunity.

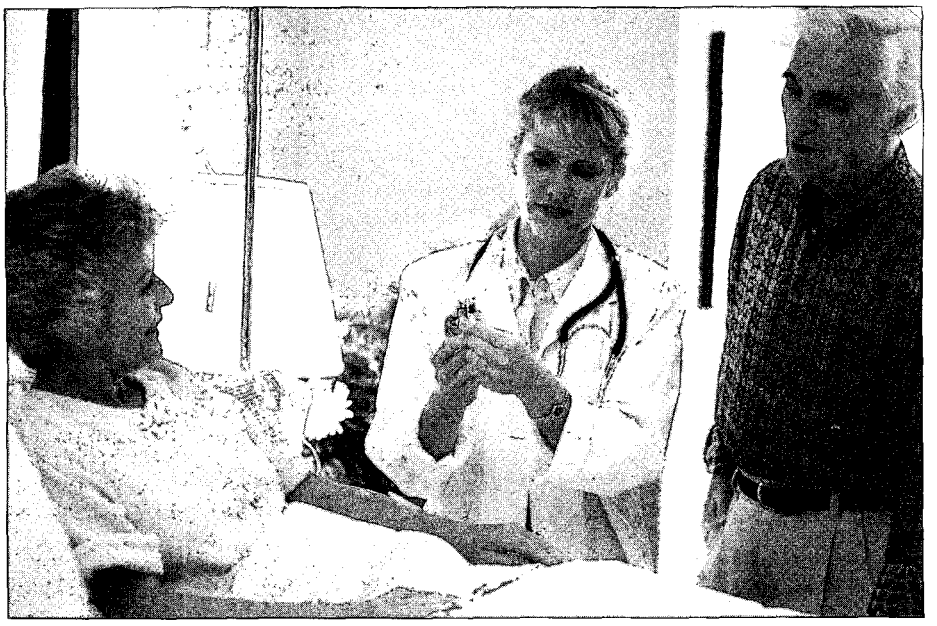
Kelley emphasizes that there is enor-

mous mobility in capitalism; that escape from poverty depends on decisions to work, to get married, and to get a high school education, none of which is completely beyond one's control. Similarly, he stresses that the provision of welfare and the "right" to health care is accompanied by real restrictions on freedom that harm its supposed beneficiaries, such as licensing, minimum wage laws, and health insurance mandates (which prevent cheap no-frills insurance from being offered).

While these are, of course, familiar points, discussing them as part of the dispute about the nature of freedom provides a tight link between philosophical and economic arguments that are often treated separately. My only complaint is that I think Kelley's arguments would have been even more powerful had he said that *even if* we wish to say that freedom is both negative and positive, only capitalism promotes both kinds of freedom—it alone protects negative rights and promotes opportunity—while the welfare state restricts both. Sometimes Kelley talks as if there is a direct path from the concept of positive freedom to the welfare state, but that's not necessarily so. Without economic determinism and faith in state action, the concept of positive freedom, while confused, need not have politically pernicious consequences.

Kelley then turns to justifications of the welfare state by appeals to benevolence and charity. He argues that charity, benevolence, and compassion cannot be primary virtues in the realm of material well-being because they depend upon the creation of wealth. Creation comes before distribution, achievement before aid. But even if charity and benevolence are not primary virtues, they are indeed virtues, and so why not view the welfare state, as the philosopher Jeremy Waldron proposes, as government-instituted charity?

Kelley answers: Because charity as a value is fundamentally different from welfare as a right. In one sense this is obvious, since the latter prevents the donor from choosing his recipients, the amount of aid, and the conditions under which aid should be given. Kelley, though, has a more important point in mind. When charity is compulsory, persons are no longer treated as ends in themselves. Instead, recipients own a piece of the donor.



Bad Medicine: David Kelley stresses that the "right" to health care is accompanied by real restrictions on freedom that harm its supposed beneficiaries.

Kelley endorses Robert Nozick's famous argument that taxation is a form of involuntary servitude. Being forced to pay 17.5 percent of one's income in taxes for the needy (about the amount now spent on such programs) is morally equivalent to forced labor for seven hours per week for the needy (seven hours out of a 40-hour work week equals 17.5 percent). While Kelley notes that taxes leave one freer to choose how to allocate one's time than forced labor, he finds the same principle at work, and says that "the more honest defenders of the welfare state" have accepted that forced labor cannot be ruled out as a means to help the needy. Kelley locates the source of the problem in the doctrine of altruism, in Ayn Rand's sense of the term, that is, the view that one has no right to exist for one's own sake and that self-sacrifice is the highest duty or virtue. Behind the appeals to charity, says Kelley, the doctrine of altruism provides the support for welfare rights.

This is the only part of Kelley's book where his arguments are not strong. First, Nozick's argument fails. Forced labor does amount to a partial ownership of me, my person, my body. But taking some of my income without consent violates my property rights, which is a different matter. My relationship to my body and my relationship to my income are different, so forcing me to work and forcing me to pay are not in the same conceptual category. Second, the view that is prevalent among academic defenders of the welfare state is not altruism, in Rand's somewhat idiosyncratic use of that term. Most of them do not defend forced labor to aid the needy, and the logic of their position does not require such a defense. It is not inconsistent to argue that basic liberty rights cannot be violated in the name of an obligation to aid.

Furthermore, since about the mid-1970s, the prevalent view among liberal political philosophers has been that there is a moral obligation to help those whose disadvantages arise *through no fault or choice of one's own.* There is a big difference between arguing that mere need, regardless of whether or not one is responsible for being needy, generates a moral obligation, and that unchosen or undeserved bad fortune so obligates. The latter certainly does not imply that self-sacrifice is the highest virtue. Although liberals believe that the obligation to help the involuntarily disadvantaged supports state welfare, one could argue the opposite, since distinguishing between those who are deserving and undeserving of aid is not exactly government's strong suit.

Indeed, in the last half of his chapter on

welfare and benevolence, Kelley does an excellent job of explaining why government is far worse than private institutions in distinguishing between the needy who should and should not be aided. He points out that when welfare is a right, personal virtues or vices become irrelevant in making aid decisions, yet it is precisely a person's character traits that play a large role in determining whether he will get off welfare permanently. Private agencies tend, for that reason, to focus upon persons' characters as much as giving them skills, and have the discretion, which a government bureaucracy operating by fixed rules does not, to tailor different kinds of aid to different recipients. (When government agencies do have that discretion, it is dangerous, since as an agency of coercion they should not intervene in clients' personal lives.)

While the positive freedom and benevolence arguments for welfare rights are quite important, probably the most influential arguments today are communitarian in flavor. These stress neither freedom, nor charity, but belonging or solidarity. Communitarianism is part of an anti-individualist tradition that believes the move to a society of choice and contract has gone too far, making us rootless and alienated from our links to our communities, links that are essential for our individual and social well-being.

Recent communitarian literature is of two types. Philosophers such as Michael Sandel and Alasdair McIntyre argue that our identity is largely shaped by unchosen social relationships, which in turn incur unchosen obligations. Hence, individual autonomy is not a central aspect of our nature. Public policy analysts such as Amitai Etzioni and politicians such as Bill Clinton stress a new social contract or covenant between the government and its citizens, whereby the benefits of the welfare state will be matched by the obligation to be responsible, to not belligerently assert one's entitlements, and to give back to the society that nurtures us.

Kelley argues that the more philosophical arguments are fallacious. Of course we are social creatures: Our knowledge, skills, and values are formed by our family, our neighborhood, and society at large. But it hardly follows from that recognition that one is permanently dependent upon those groups for one's identity, since people have the capacity for independent, reflective judgment and are able to choose the groups with which they wish to associate.

Similarly, there is no doubt that we are enormously in debt to the culture we have inherited and that we should be grateful to our parents who raised us. But that doesn't imply the existence of some amorphous moral agent called society, for which the state can bill us to pay for entitlements. Our social nature is thus perfectly compatible with the idea that individuals are autonomous beings who should have the freedom and responsibility to shape their own lives.

Kelley's criticism of the anti-individualist argument is similar to that leveled by other defenders of individualism (though I do wish he had addressed the ties of ethnicity, race, and gender, which are less matters of choice). He provides, however, a distinctive account of the communitarian emphasis on balancing rights and responsibilities, which, he argues, is really a sign that welfare rights are not basic human rights on a par with rights to life, liberty, and property.

The problem is not just that welfare rights as a category conflict with negative rights, since the former require unchosen positive obligations, that when enforced, deprive others of liberty and property. The deeper problem is that welfare rights are in conflict with *one another*. Welfare rights are open-ended. Rights to housing, food, shelter, and medical care cannot, in the real world, meet all of people's needs for these goods. The state must adjudicate these various conflicts and pick and choose. In so doing, welfare rights become a right to whatever welfare goods the government chooses to provide.

Thus, says, Kelley, we arrive at "a fundamental change in the conception of rights. The original conception is that a right protects an individual against encroachment and oppression by society. A right is not a privilege that depends on the will of others but a claim that they are obliged to respect. Once welfare rights enter the picture, however, the unavoidable conflict among rights, and the need for government to choose among, turn all rights into privileges." *All* is an exaggeration—it's not clear why rights like the right not to be assaulted are so transformed. That to one side, I was convinced by Kelley's basic point that the demand for balancing rights and responsibilities is really an acknowledgment of how the welfare state has transfigured the nature of rights. Communitarian metaphors of a social contract or covenant may help soften this blow, by giving the impression that we have somehow all participated or consented to this arrangement, but of course that's a fiction.

Kelley sees Social Security as emblematic of the problems with communitarianism. Its pay-as-you-go financing, in which present workers' taxes, rather than investment, fund retirees' pensions, seems to represent a kind of solidarity between members of different generations. As Robert Ball, a former commissioner of Social Security, puts it, Social Security "is based on the premise that we are all in this together, with everyone sharing responsibility for the security of everyone else, present and future."

The financial disaster of Social Security reveals the moral bankruptcy of these arguments. Social Security's huge unfunded liabilities and terrible rate of return for those born since World War II shows that a fictional solidarity between the living and the dead provides no basis for security. The shared "responsibility" inherent in Social Security is a pale imitation of the real thing, since the amount one receives is virtually independent of any planning or prudence on one's part. The "we are all in this together" rationale for Social Security is really a way of disregarding economic reality, of pretending that taxation is as secure a foundation for retirement as investment.

It's hard to quarrel with Kelley on any of these points–except to suggest that Social Security's problems mean that communitarians should at this point consider privatization as better than tinkering with the status quo. After all, solidarity depends on trust and on keeping one's promises (which Social Security cannot do). As important, the public awareness of the unfairness of the system is setting generations against one another, something a communitarian would want to avoid above all.

Kelley's book is an impressive achievement. Most of the arguments are powerful, and even better, Kelley combines arguments that are usually treated separately: moral arguments about the aims or rationales of the welfare state, and practical or social science arguments about its effects. He writes exceedingly well, and the book is not just aimed at or understandable by academics. It will, I hope, have a wide audience.

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King of the Jungle

By John J. Miller

Tarzan Forever: The Life of Edgar Rice Burroughs, Creator of Tarzan, by John Taliaferro, New York: Scribner, 400 pages, $30.00

Edgar Rice Burroughs was in bed reading the Sunday funnies on the morning of March 19, 1950, when he quietly slumped over, leveled by a heart attack at the age of 74. Death apparently came as he was reading a *Tarzan* comic strip. "At least," writes biographer John Taliaferro, "it is pleasant to think so."

Burroughs had been a failure at many things. He had not been a particularly good student growing up, his two marriages had fallen apart, and he couldn't hold a steady job. His careers included a stint in the Seventh Cavalry and work as a cowpuncher, newsstand clerk, pencil-sharpener salesman, and alderman (he skipped town three weeks after the election). Sometime in 1911 he started to write in his spare time, using the backs of old letterheads from a stationery firm his brother owned in Chicago. He sent his first story, *A Princess of Mars*, to the pulps, where an editor snatched it up, after a few revisions, for $400. This wasn't enough for Burroughs to quit his day job, but it inspired him to keep going. Within a year he had completed another tale, *Tarzan of the Apes*.

Its runaway success would define his life—and unlock an entrepreneurial spirit rarely found in the literary set. "There can be little question that [Burroughs] was the most widely read American author of the first half of the twentieth century," writes Taliaferro in his engaging biography of Burroughs, *Tarzan Forever*. Taliaferro estimates that Burroughs sold somewhere between 30 million and 60 million books during his life—an astonishing figure, especially for the time. By combining a critical enthusiasm for Burroughs, with an appreciation for his subject's business dealings, Taliaferro shines klieg lights on a man either derided or ignored by the English departments.

Unlike many of his competitors then and imitators now, Burroughs did more than scribble words. He built the prototype of a multimedia empire, entering the emerging worlds of radio and movies the way today's conglomerates grasp at cable and the Internet. "As he saw it, there was no such thing as overkill, and well before Walt Disney ever hawked his first mouse ears or Ninja Turtle 'action figures' became film stars, Burroughs was already the grand master of a concept" immediately familiar to people today, reports Taliaferro.

Thanks to Burroughs' efforts, Tarzan is a ubiquitous icon of pop culture, an instantly recognizable character in the American imagination. Every boy, by instinct or design, will at some point reenact the scene Burroughs created so vividly in his first Tarzan story. After slaying a tiger (changed to a lion in later editions, after Burroughs learned that tigers don't live in Africa), Tarzan performed his most famous feat: "With swelling breast, he placed a foot upon the body of his powerful enemy, and throwing back his fine young head, roared out the awful challenge of the victorious bull ape." The famous Tarzan yell. When actor Johnny Weissmuller hollered it in *Tarzan the Ape Man* (1932), it was, as Taliaferro describes, "a thing of primal virtuosity."

Much of Burroughs' oeuvre is sheer hackwork, and the author knew it. A productive year meant writing something like 400,000 words. Considering that a standard novel today contains perhaps half that many, if that much, this is an extraordinary output. There's an old crack that if you put a monkey in front of a typewriter and give him an endless amount of time, he'll eventually punch out *Hamlet*. Burroughs' reputation rests on a similar principle. As he once noted, "If you write one story, it may be bad; if you write a hundred, you have the odds in your favor."

Burroughs was simply one of the best adventure writers in the English language. Although he lacked the highbrow aims of H.G. Wells or the narrative skills of Jack London, he could relate an action sequence like few others. His best stories are the early ones—later in life, he felt suffocated by the need to produce an unending train of sequels to his first few yarns, and grew frustrated that he would never top his first Tarzan tale. His heroes were all of a type, men of good breeding who found themselves adapting to an unfamiliar environment—Tarzan raised by apes in the jungle, John Carter transported to Mars, David Innes exploring the hollow earth, Carson Napier roaming Venus, Bowen Tyler tramping around The Land That Time Forgot. His most successful stories always had a love interest, too. No Tarzan is complete without a Jane.

Many of his plots had ridiculous elements, as if they were pulled from bad *Star Trek* episodes (or perhaps inspired a few?). In one story, for instance, a mad scientist genetically engineers a group of gorillas to replicate the court of Henry VIII. In another, Tarzan stumbles on a lost tribe of cannibals. With tails. Burroughs sometimes tried, clumsily, to inject social commentary into his work, including undisguised attacks on Bolsheviks and Nazis. (In one Venus novella, the heroes battle an evil cult of anagrammatized "Zanis.") Yet he was also an armchair devotee of eugenics and early-20th-century race theory, and reading his depictions of non-whites, especially tribal Africans, can be a bristling experience.

Despite these unfortunate tendencies,

Brand Tarzan: Unlike many of his competitors then and imitators now, Edgar Rice Burroughs did more than scribble words. He built the prototype of a multimedia empire, entering the emerging worlds of radio and movies.

Burroughs knew how to craft a potboiler. *Tarzan of the Apes* is still a good read, and is even available as an inexpensive Signet classic, with an introduction by Gore Vidal. Many of his other works remain in print as well.

The life of a freelance writer demands strong business skills, and Burroughs found himself in a cutthroat world negotiating pay rates and author rights with stingy editors. When Burroughs finished a story, he would mail it to one of the pulp magazines, which offered a popular form of entertainment back in the days when ordinary folk would fill their leisure time with reading instead of television. Pulps paid by the word, so authors tended to overwrite. Burroughs was no exception. In fact, when editors asked him to revise a manuscript, he usually lengthened his work—and therefore his fee. This habit discouraged editors from meddling too closely with the text, and provided an incentive for immediate acceptance (or, in some cases, refusal).

Burroughs would also sell the same story many times over. After the pulps, he would look to books and newspaper serialization. No single sale was especially large, but small checks from scores of sources poured into his office. And it all added up.

He worked hard to squeeze every last money-making opportunity out of his work. "As he saw it, the act of writing was only part of his job description; marketing, he grasped, could and should be its own fine art," says Taliaferro. Burroughs became an expert at syndication and subsidiary rights, the sort of nitty-gritty detail-work that most successful writers today find so distracting that they hire agents. Although Burroughs eventually used a syndication agency and personal assistants, he routinely handled financial matters himself. In fact, Burroughs was a pioneer in establishing authors' rights to their own work, insisting, as is standard today, that writers retain secondary rights to their manuscripts.

Burroughs incorporated himself in 1923, issuing stock to himself, his wife, and his kids. In effect, he became an employee of his own company. He was not the first author to do this—lower taxes made it an easy choice—but he was certainly one of the practice's early advocates. The switch helped him stay in charge of his burgeoning business. (Tarzan was a big hit overseas and was being read in 17 languages, including Arabic and Icelandic.) It also aided his forays into ranching, investing, and real estate (he was the first developer of the Los Angeles suburb Tarzana). Despite these gains, the move increasingly made Burroughs treat his stories like products. "It must be wonderful to be able to devote one's life to art for art's sake, a luxury which I have never been able to afford," he once complained.

Burroughs' heirs will always appreciate his decision to incorporate. This summer, ERB, Inc., which still holds the copyright to the Tarzan name, can expect a new windfall when Disney packs movie theaters with a new animated version of Tarzan. Back in 1918, *Tarzan of the Apes* became one of the first movies to gross $1 million. The franchise's profitability only grew, especially when Weissmuller, a gold-medal-winning swimmer at the Olympics, assumed the title role in the early '30s. He was, in fact, the sixth actor to play Tarzan, and by far the most successful one. For a generation of boys growing up during the Depression, he was Luke Skywalker. (He also never uttered the legendary line, "Me Tarzan, you Jane." As Taliaferro explains, the famous scene has Weissmuller gesturing back and forth between Maureen O'Sullivan and himself, saying, "Jane... Tarzan...Jane...Tarzan.")

Following smash success on the silver screen, Tarzan spin-off products became a lucrative side industry for Burroughs and his business partners. There were Tarzan bows, arrows, spears, rubber knives, bathing suits, masks, costumes, pith helmets, games, and jungle maps. "Eventually there would be Tarzan bread, Tarzan ice cream, and Tarzan chewing gum," relates Taliaferro. There were even Tarzan boys clubs (called "clans"), complete with secret initiation rituals, instructions to make Tarzan weapons, and information on how to speak the language of apes.

Burroughs lived comfortably but never attained fabulous wealth; he was much better at earning money than spending it. Yet he left behind the kind of lasting legacy every aspiring author dreams about. In that sense, the title of Taliaferro's biography is perfect. *Tarzan Forever.* ◆

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Bill's Excellent Adventure

Clinton's ultra-violent video game

By Thomas W. Hazlett

When Bill Clinton's felonies got him into hot water, the smart money began shorting innocent civilians around the globe. First came the Starr report attack in September: U.S. cruise missiles took out a pharmaceutical factory in Sudan. Then, with impeachment going to the House floor in December, massive air strikes against Iraq had to be launched to avoid the holiday rush (Muslim holy days were just around the corner). And soon after beating the rap and "getting back to the business of the American people," the president celebrated his Easter with a rain of terror on the imperial Serbian menace.

We've heard much of the ethnic cleansing by Slobodan Milosevic, and objective character references strongly suggest that Slobo will not be welcomed to a cool, crisp hereafter. How his eternal damnation can be moved up in real time is, for we mortals, quite a difficult question—one whose complexity seems not to interest our American commander in chief. Clinton now clasps the war machine joystick as maniacally as a suburban high school sophomore addicted to Doom, and he finds the Yugo socialist a convenient pop-up target in his own ultra-violent video game.

It is becoming more and more apparent that impeachment was, for Clinton, a truly liberating experience. Having for an instant flatlined politically, he has confounded his friends and foes alike by the mere act of surviving. He has, in his amoral view of things, achieved superhuman status. He is no longer subject to the constraints of lesser men—which is to say, anyone with a conscience.

This, needless to say, is a dangerous state of affairs for America. But as the chart shows, it is far riskier for those foreign civilians whom Clinton is liberating from the dictator Milosevic.

Add to that total, of course, the 1.5 million refugees and displaced persons who in the wake of Bill's excellent adventure elected to leave their homes and worldly possessions to camp out elsewhere. "Cheer up, you lucky bastards," NATO spokesmen chirp, "Slobodan Milosevic would have gotten around to this sooner or later, anyway."

In Clinton's world, all of this makes eminent sense. He has taken dramatic, headline-grabbing action. Republicans are afraid to criticize him too openly, except for the likes of John McCain and Liddy Dole, who flacked for military escalation including ground troops. And there is a story: Clinton, a man who is rapidly destroying irony by fantastic storytelling, waxes eloquent about our moral obligation to stop "ethnic cleansing."

There is such a duty. But do not for a moment think that Clinton is moved by it. More important, there is simply no doubt that in this very brutal world, moral obligation is not the only—or even the primary—justification for killing people we do not know. Self-defense trumps all else, and the merry ballistic escapades of the late Clinton months are high-risk gambits actively undermining America's actual security interests vis-à-vis real world powers with real nuclear weapons.

Beyond self-interest there is the morally important matter of human impact. In general, the United States has elected not to stop ethnic cleansing in Biafra, or Ethiopia, or Cambodia, or Rwanda. The Persian Gulf War was successful precisely because it pursued a limited and clear objective—eliminating the Iraqi invaders from Kuwait—and did so with massive force involving widespread domestic and international support.

War needs more than righteousness—the bright line of international aggression, for instance, allows a military objective to be seized and a military exit to be staged. Conversely, where one rides into a civil war, the moral obligation to end strife instantly morphs—under the best-case scenario—into a more powerful obligation to preserve the peace. Indefinitely.

Years ago, the Chinese were slaughtered wholesale in Mao's Cultural Revolution; just a decade ago they were murdered retail at Tiananmen. But not only is our military response nil, our morally obligated president today touts a "strategic alliance" with China. Is this right? Sadly, on the whole, yes. What could be gained by military intervention? The loss of much innocent life is the only dependable outcome; all other bets are off. We are properly slow to report for duty that entails mass civilian deaths, or that raises the probability of nuclear holocaust even a small fraction. Discretion is the better part of valor, said Shakespeare. Good consciences themselves constrain.

Those who have them, that is. Back at the White House, meanwhile, scribblers script tales of the atrocities of enemies and the heroism of allies. Polls surge, history salutes, civilians die. And you thought they didn't have a plan. ◆

Selected Collateral Damage in Kosovo

WHEN	WHAT/WHERE	CIVILIANS DEAD
April 12	Passenger train near bridge	10
April 14	Refugee convoy	72
April 23	TV station in Belgrade	15
May 1	Passenger bus on bridge	23
May 7	Civilian market	15
May 8	Chinese embassy	3

Source: Amnesty International

Contributing Editor Thomas W. Hazlett (hazlett@primal.ucdavis.edu) is an economist at the University of California at Davis and a resident scholar at the American Enterprise Institute.

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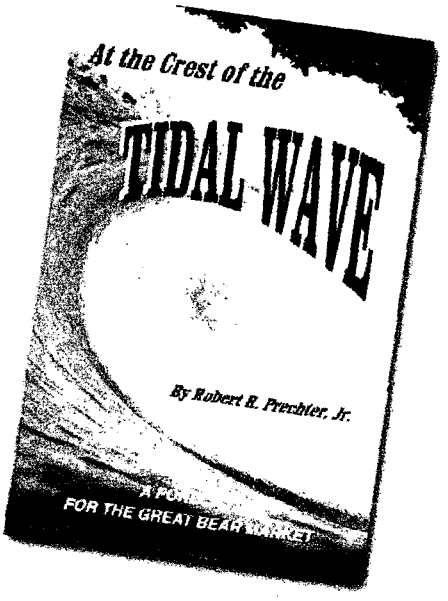

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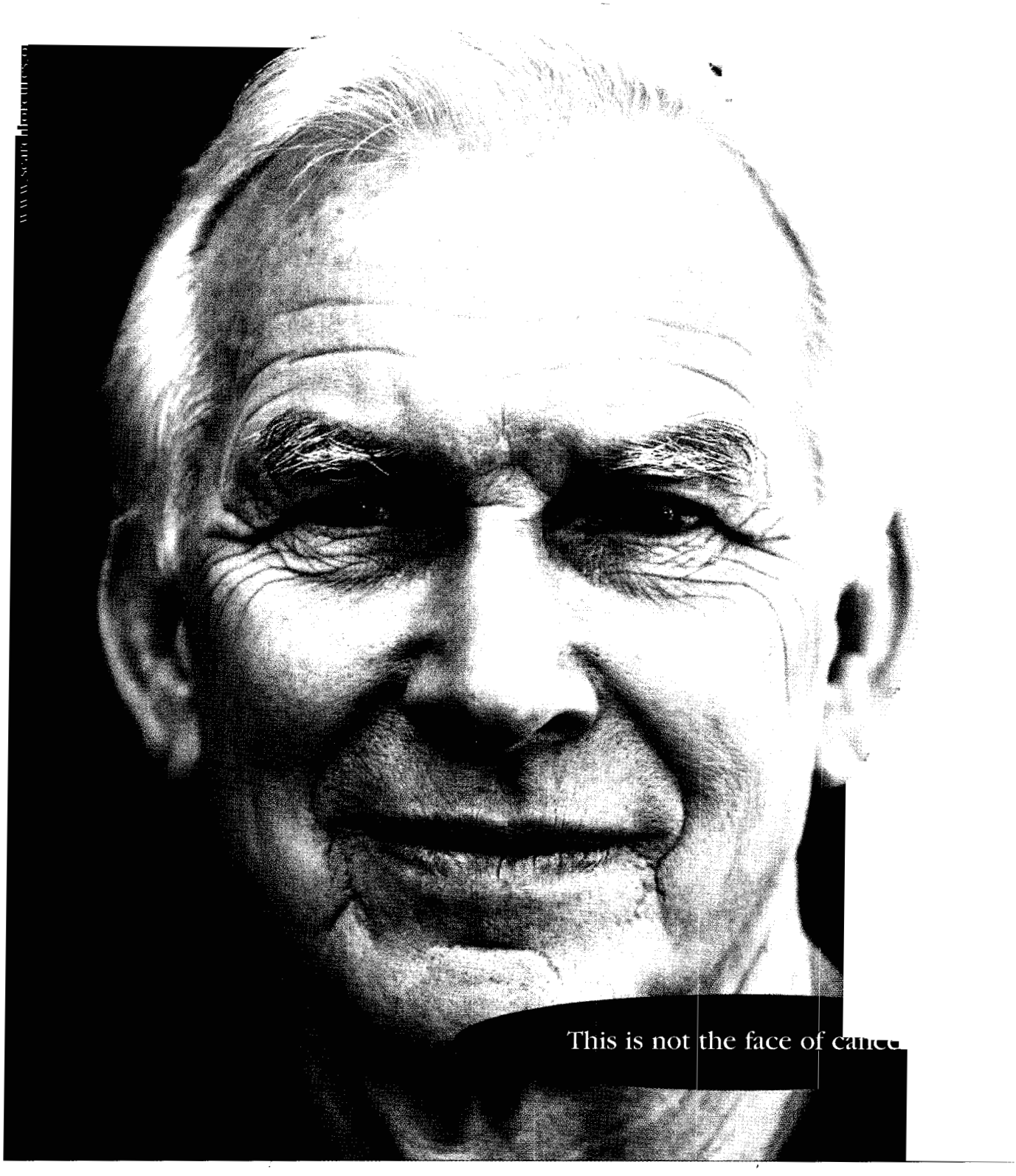

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